TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 123

JAMES C. DAVIS, AGENT UNITED STATES RAILROAD ADMINISTRATION, PLAINTIFF IN ERROR,

vs.

A. J. PARRINGTON

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED SEPTEMBER 14, 1922

(29,145)

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Names and Addresses of Attorneys of Record.

ARTHUR C. SPENCER, JOHN F. REILLY, and CHARLES E. COCHRAN, Wells Fargo Building, Portland, Oregon,

For the Plaintiff in Error.

WILSON & GUTHRIE, Platt Building, Portland, Oregon,

For the Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Oregon,—ss.

To A. J. Parrington, GREETING:

You are hereby cited and admonished to be and appear before the UNITED STATES CIRCUIT COURT OF APPEALS for the NINTH CIRCUIT, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the DISTRICT COURT OF THE UNITED STATES for the DISTRICT OF OREGON, wherein James C. Davis, Agent, United States Railroad Administration is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 28th day of September, in the year of our

Lord, one thousand nine hundred and twenty-one.

R. S. BEAN,
Judge. [1*]

Due and legal service of the within citation is hereby admitted and accepted at Portland, Oregon, this 28th day of September, 1921.

JAMES WILSON,
Attorney for Defendant in Error.

[Endorsed]: No. 8747. United States District Court, District of Oregon. James C. Davis, Agent, United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Citation on Writ of Error. U. S. District Court, District of Oregon. Filed Sep. 28, 1921. By G. H. Marsh, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Oregon, GREETING:

Because in the records and proceedings, as also in

*Page-number appearing at foot of page of original certified Transcript of Record.

the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between A. J. Parrington, plaintiff and defendant in error, and James C. Davis, Agent, United States Railroad Administration, defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Nonorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 28th day of September, 1921.

[Seal] G. H. MARSH,
Clerk of the District Court of the United States for the District of Oregon. [2]

The foregoing writ of error was duly served upon

the District Court of the United States for the District of Oregon, by filing a copy thereof with me as the clerk of said Court on this 28th day of September, 1921.

G. H. MARSH,
Clerk, United States District Court, District of Oregon.

[Endorsed]: No. L.—8747-27-192. In the U. S. Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Agent, United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Writ of Error. Filed September 28, 1921. G. H. Marsh, Clerk, United States District Court, Clerk. District of Oregon.

In the District Court of the United States for the District of Oregon.

November Term, 1920.

BE IT REMEMBERED, that on the 12th day of February, 1921 there was duly filed in the District Court of the United States for the District of Oregon a complaint, in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

AT LAW.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Complaint.

Comes now the plaintiff and for cause of action against the defendant alleges:

I.

That the San Francisco & Portland Steamship Company is now and during all the times hereinafter complained of was a corporation organized and existing under and by virtue of the laws of the State of Utah, and was the owner of the line of steamboats and steamships operating between San Francisco, in the State of California, and Portland, in the State of Oregon.

II.

That from midnight of December 28, 1917, to midnight of February 29, 1920, the United States Railroad Administration was in control of said line of steamboats and steamships between San Francisco and Portland of the San Francisco & Portland Steamship Company, and was operating the same as

common carrier in interstate commerce under the authority of the United States and the Director General of Railroads, and pursuant to its tariff, rules, and regulations for said purpose adopted and provided; that pursuant to the act of Congress and his appointment by the President of the United States, defendant John Barton Payne is now the duly appointed, qualified, and acting agent of said United States Railroad [4] Administration and authorized to represent it in the defense of this action.

III.

That the Oregon-Washington Railroad & Navigation Company pursuant to section 5 of the act of Congress known as "The act to Regulate Commerce," as amended by the act of Congress of August 24, 1912, entitled "An act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the sanitation and government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock in the San Francisco & Portland Steamship Company for permission to continue the ownership and control and to continue the operation of the line of steamships and steamboats of the said San Francisco & Portland Steamship Company between San Francisco and Portland after the first day of July, 1914, which said permission was granted, and thereafter said San Francisco & Portland Steamship Company in reference to the operation of its steamships and steamboats on the line or route between San Francisco and Portland has been

at all times subject to the Act to Regulate Commerce and all amendments thereto in the same manner and to the same extent as the railroad controlling said water carrier.

IV.

That heretofore and prior to the taking control of said line of steamboats and steamships by the said United States Railroad Administration, said San Francisco & Portland Steamship Company in conjunction with the Oregon-Washington Railroad & Navigation Company filed with the Interstate Commerce Commission a schedule of rates contained in Oregon-Washington [5] Railroad & Navigation Company's tariff No. 131-A, Interstate Commerce Commission No. 384 and supplements thereto, and published the same, which said schedule of rates became effective prior to December 28, 1917; that the rates so established by said schedule over the line of steamboats or steamships of defendant on the line or route from San Francisco, California, to Portland, Oregon, thence via the line of the railroad of the Oregon-Washington Railroad & Navigation Company to North Portland, in the State of Oregon, on sugar in carload lots of the minimum weight of thirty thousand (30,000) pounds was and is twelve and one-half (12½) cents per hundred pounds; that said rate was continued in force and effect by the United States Railroad Administration up to and inclusive of June 24, 1918; that pursuant to General Order No. 28 of United States Director General of Railroads, there was filed with the Interstate Commerce Commission and published

by said Director General of Railroads then operating said line of the San Francisco & Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company over the line or route above alleged, Special Supplement No. 14 to said above-named tariff, which said supplement became effective June 25, 1918, and established a rate of fifteen and one-half (15½) cents per hundred pounds on shipments of sugar in carload lots of the minimum weight of thirty thousand (30,000) pounds from San Francisco, California, to North Portland, Oregon, which said rate continued in force and effect and was the lawfully established rate for shipments of sugar in said carload lots up to and inclusive of the 29th day of February, 1920. [6]

V.

That during all of said times the United States Railroad Administration on all shipments of sugar in carload lots over said line or route from San Francisco to Portland was charging a greater rate for the distribution thereof via the said steamboat and steamship line from San Francisco to Portland than was charged by it over the same route for the shipment of sugar from San Francisco to North Portland, said haul from San Francisco to Portland being included within the distance of San Francisco to North Portland; that on all shipments of sugar hereinafter specified carried by the said United States Railroad Administration from San Francisco to Portland via the steamboat and steamship line of the San Francisco Steamship Company from and including the 29th day of December, 1917, up to and

inclusive of the 24th day of June, 1918, the said United States Railroad Administration charged and collected the sum of fifteen (15) cents per hundred pounds in carload lots from San Francisco to Portland, and on all said shipments of sugar hereinafter specified shipped on and after the 25th day of June, 1918, up to and inclusive of the 29th day of February, 1920, said United States Railroad Administration charged and collected the sum of nineteen (19) cents per hundred pounds.

VI.

That on all such shipments said United States Railroad Administration exacted and charged as war tax at the rate of 3% of charges collected, and that such charges were to the extent that the same exceeded the rate established and in effect from San Francisco to North Portland at the same time illegal and unlawful and charged without authority of law, and the exaction of a war tax on the excess of such charges over said rate from San Francisco to North Portland was illegal and unlawful and [7] exacted without the authority of law and in violation of section 4 of the act of Congress known as "The Act to Regulate Commerce" and amendments thereto.

VII.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Wadhams & Kerr Brothers, a number of carloads

of sugar on the date and of the weight shown in Exhibit "A" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of 3% thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Wadhams & Kerr Brothers, a number of carloads of sugar on the date and of the weight shown in Exhibit "B" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Wadhams & Kerr Brothers; and that said Wadhams & Kerr Brothers have heretofore for a valuable consideration, sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified. [8]

VIII.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, con-

signed to Mason, Ehrman & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "C" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Mason, Ehrman & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "D" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Mason, Ehrman & Company; and that said Mason, Ehrman & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

IX.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland [9] Steamship

Company over the route hereinabove specified, consigned to Wadhams & Company, a number of carloads of sugar, on the date and of the weight shown in Exhibit "E" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Wadhams & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "F" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Wadhams & Company; and that said Wadhams & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

X.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of

the San Francisco & Portland Steamship Company, over the route hereinabove specified, consigned to T. W. Jenkins & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "G" attached hereto and made a part of this complaint, on all of which defendant [10] received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to T. W. Jenkins & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "H" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by T. W. Jenkins & Company; and that said T. W. Jenkins & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

XI.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from

San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Lang & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "I" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war-tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, [11] Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Lang & Company, a number or carloads of sugar on the date and of the weight shown in Exhibit "J" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Lang & Company; and that Lang & Company have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

XII.

That between the 29th day of December, 1917,

and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Olds, Wortman & King, a number of carloads of sugar on the date and of the weight shown in Exhibit "N" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Olds, Wortman & King, a number of carloads of [12] sugar on the date and of the weight shown in Exhibit "O" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Olds, Wortman & King; and that said Olds, Wortman & King have heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

XIII.

That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Pacific Coast Biscuit Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "P" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Pacific Coast Biscuit Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "Q" attached hereto and made a part of this complaint, on all of which defendant [13] received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Pacific Coast Biscuit Company; and that said Pacific Coast Biscuit Company has heretofore and for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against

the defendant on all shipments shipped between the dates above specified.

XIV.

That Astoria is on the route of said Steamship Company between San Francisco and Portland, and between San Francisco and North Portland, and the rates on sugar, carload lots, from San Francisco to Astoria are the same as from San Francisco to Portland; that between the 29th day of December 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Astoria via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Lang & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "K" attached hereto and made a part of this complaint, on all of which defendant received and collected as transportation charge fifteen (15) cents per hundred pounds, together with war tax of three (3) per cent thereon; that between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Astoria, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Lang & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "L" attached hereto and made a part of this [14] complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph

enumerated on the shipments listed were paid by Lang & Company; and that said Lang & Company has heretofore for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified.

XV.

That between the 25th day of June, 1918, and the 29th day of February, 1920, there was shipped from San Francisco to Astoria, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Ross Higgins, Mason Ehrman & Company, a number of carloads of sugar on the date and of the weight shown in Exhibit "M" attached hereto and made a part of complaint, on all of which defendant received and collected as transportation charge nineteen (19) cents per hundred pounds, together with war tax of three (3) per cent thereon; that all of said charges above in this paragraph enumerated on the shipments listed were paid by Ross Higgins, Mason Ehrman, Company; and that said Ross Higgins, Mason Ehrman Company has heretofore and for a valuable consideration sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and *excess* war tax and claim against the defendant on all shipments shipped between the dates above specified.

XVI.

That all of said charges were paid by the respective consignees in the exhibits attached hereto on the re-

spective [15] dates shown in the column "Date Paid," that the overcharges on each and all of said shipments are designated in the column headed "Overcharges," that all of said overcharges were illegally exacted and exacted contrary to the provisions of section 4 of the act of Congress known as the Act to Regulate Commerce, and amendments thereto, and the plaintiff's assignors were compelled to and did pay the same in order to secure delivery and possession of said shipments, and the defendant is indebted to the plaintiff in the full sum of said overcharges, to wit, the sum of six thousand sixty-two and 77/100 dollars ($6,062.77), together with interest at the rate of 6% per annum from the respective dates upon which said respective overcharges were exacted, and plaintiff has been damaged in the full sum of said overcharges and interest.

XVII.

That the sum of fifteen hundred dollars ($1500.00) is the reasonable sum to be allowed the plaintiff as attorney's or counsel's fees herein.

WHEREFORE, plaintiff prays for judgment against the defendant in the sum of six thousand sixty-two and 77/100 dollars ($6,062.77), together with interest on the respective overcharges from the date of payment thereof, and for the further sum of fifteen hundred dollars ($1500.00) as attorney's or counsel's fees, and for costs and disbursements incurred herein.

WILSON & GUTHRIE,
Attorneys for Plaintiff.

United States of America,
District of Oregon,—ss.

I, A. J. Parrington, being first duly sworn, on my oath depose and say that I am the plaintiff [16] above named, that I have read the foregoing complaint, know the facts therein stated, and that the same are true as I verily believe.

A. J. PARRINGTON.

Subscribed and sworn to before me this 12th day of February, 1921.

[Seal] JAMES G. WILSON.
Notary Public for Oregon.

My commission expires September 26, 1924. [17]

AND AFTERWARDS, to wit, on the 8th day of March, 1921, there was duly filed in said court a demurrer to the complaint, in words and figures as follows, to wit: [35]

In the District Court of the United States for the District of Oregon.

A. J. PARRINGTON,
Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),
Defendant.

Demurrer.

Comes now the above-named defendant and demurs to the complaint on file herein on the ground

I.

That the Court has no jurisdiction of the subject matter of the action.

Defendant will rely in presenting this demurrer on the proposition that the Intestate Commerce Commission has exclusive original jurisdiction of controversies of this character.

JOHN F. REILLY,
A. C. SPENCER,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, John F. Reilly, one of attorneys for defendant, hereby certify that in my opinion the foregoing demurrer is well founded in law.

JOHN F. REILLY.

Service by copy admitted at Portland, Oregon, March 8, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed March 8, 1921. G. H. Marsh, Clerk. [36]

AND AFTERWARDS, to wit, on the 4th day of April, 1921, there was duly filed in said court, an opinion on demurrer to the complaint, in words and figures as follows, to wit: [37]

In the District Court of the United States for the District of Oregon.

L.–8748.

A. J. PARRINGTON,

Plaintiff,

vs.

SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Defendant.

L.–8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent, United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

L.–8723.

THE PORTLAND SEED COMPANY, a Corporation,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Company),

Defendants.

Opinion on Demurrer to Complaint.

Portland, Oregon, April 4, 1921.

MEMORANDUM by BEAN, District Judge:

Demurrers in these three cases were argued and submitted together and will be so disposed of by this memorandum.

The first case is an action to recover as damages the difference between the rates charged plaintiff's assignors by defendant steamship company on shipment of sugar from San Francisco to Astoria and Portland and the rate on the same commodity charged by the defendant to North Portland, a longer distance. Part of the shipments moved prior to Federal control of the carriers and the rest after the termination thereof.

The second case is an action against the Director General of Railroads and covers shipment of sugar over the same line between the same points. [38]

The third case is a similar action against the Director General of Railroads, covering a shipment of

alfalfa from Roswell, New Mexico, to Yakima and Walla Walla, Washington.

The theory of the complaints is that Portland and Astoria in the first two cases are intermediate points between San Francisco and North Portland, and Roswell in the third case is an intermediate point between Pecos, Texas, and Yakima and Walla Walla; and as the rates charged for transportion to these intermediate points were greater than the tariff rates applicable to similar shipments to North Portland, a more distant point, in the first two cases, and from Pecos, Texas, a more distant point in the third case, than the intermediate point, the carriers thereby violated section 4 of the Interstate Commerce Act, commonly known as the Long & Short Haul Clause.

Demurrers have been interposed to the various complaints on the ground (1) that the court is without jurisdiction of the subject matter because exclusive original jurisdiction is lodged in the Interstate Commerce Commission; (2) in the first case the complaint does not state facts sufficient to constitute a cause of action and (a) the right of action on all claims arising prior to January 1, 1918, the beginning of federal control, is barred by the statute of limitations.

The right of a shipper to maintain an action against a carrier, subject to the provisions of the Interstate Commerce Act, to recover damages for a violation of section 4 (36 Stat. at L. 547), in charging and receiving greater compensation for the transportation of like kind of property for a shorter than a longer distance over the same line or [39] route,

in the same direction, the shorter being included within the longer distance, is ruled, as far as this court is concerned, by the decision of the Court of Appeal in S. P. vs. Cal. Adjustment Co., 237 Fed. 954, holding that under a similar law of California the injured party could sue in the courts without first applying to the Commission for relief. There are two classes of acts which may form the basis for a proceeding for damages against a carrier under the Interstate Commerce Act: one where the legal quality of the practices complained of is not definitely fixed by statute, but is an administrative question depending upon the facts to be ascertained from investigation in which case the Commission has original jurisdiction. (Texas & Pac. Ry. vs. Abilene Cotton Oil Co., 204 U. S. 426; B. & O. R. R. vs. U. S., 215 U. S. 481; Robinson vs. B. & O., 222 U. S. 506; Mitchell Coal vs. Penn. R. R., 230 U. S. 247; Morrisdale Coal vs. Penn. R. R., 230 U. S. 304; Tex. & Pac. vs. American Tie Co., 234 U. S. 138; N. P. vs. Solum, 247 U. S. 477). The other where the act complained of is directly prohibited by statute. In such the injured may sue without previous action by the Commission, because the court can apply the laws to the facts of the case. (Penn. R. R. vs. International Coal, 230 U. S. 184; Penn. R. R. vs. Puritan Coal, 237 U. S. 121; Penn. R. R. vs. Somner, 242 U. S. 120).

As the long and short haul clause of the Interstate Commerce Act prohibits the charging and receiving by a carrier of a greater compensation for shorter than it charges for transportation of a like kind of property for a longer distance over the same line or

route, in the same direction, the acts complained of in these cases are prohibited by statute, and the injured party may in my judgment sue without first applying to the Commission for relief.

(2) The shipments involved in two of the cases were [40] by water from San Francisco to Portland and it is claimed that the Interstate Commerce Act does not apply to such a transportation. The act to regulate commerce as it existed prior to 1912 probably did not, but it was amended in that year (37 Stat. 566) by providing in substance that from and after the first day of July, 1914, it should be unlawful for any railroad company or other common carrier subject to the act to own, lease, operate, or control, or have any interest whatever in any common carrier by water, operated through the canal or otherwise, with which the railroad does or may compete for traffic, unless the Interstate Commerce Commission should be of the opinion that any existing specific service by water is being operated in the interest of the public, other than through the canal, and is of advantage to the commerce and convenience of the public, in which case it was authorized by order to extend the time during which such service may be continued to be operated beyond the first of July, 1914, and "in every extension, the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission, and shall be subject to the Act to Regulate Commerce, and all amendments thereto, in the same manner and to the same extent as the railroad or the common carrier

controlling such water carrier or interested in any way in its operation."

It is alleged in the complaints that the O.–W. R. & N. R. R. is and was the owner of the stock and controlled the defendant steamship company at the times complained of and that it had applied to and obtained authority from the Commission to continue the service. The steamship company was therefore within the terms of the Interstate Commerce Act and subject to its provisions. [41]

3. It is urged that the action is barred as to shipments moving prior to federal control, by section 16 of the Interstate Commerce Act as amended in 1910 (36 Stat. 554), which provides that "all complaints for the recovery of damage shall be filed with the Commission within two years from the time the cause of action accrued and not after." This provision is, by its language, confined to complaint filed with the Commission, and although there is some expression in the opinion of the court in Phillips vs. Grand Trunk (236 U. S. 662) which lends support to the view that it is applicable to actions brought in the courts, I am not prepared to so hold. But however that may be, the Transportation Act (sec. 206, subdiv. f, 41 Stat. at L. 462) declared that "the period of federal control shall not be computed as a part of the period of limitation in acts against carriers or any claims for reparation to the Commission for a cause of action arising prior to federal control," and this operated to toll the statute. (Opinion of Judge Rudkin,

in Wenatchee Produce Co. vs. Great Northern Ry. Co.)

4. As to freight moving while defendant was under federal control, it is urged that because the President is given authority to initiate rates (40 Stat. at L. 456) which shall not be suspended by the Commission pending final determination, rates theretofore established by the carriers and maintained by the President became legal regardless of whether they complied with the provisions of the Interstate Commerce Act. The federal control act provides that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal law, except insofar as may be inconsistent with the provisions [42] of the act or any other act applicable to federal control or with any order of the President.

It would seem therefore that the only exception made as to the rates initiated by the President is that they shall not be suspended by the Commission pending final determination. In all other respects they are subject to the various applicable provisions of law.

5. It is urged that under the provisions of the Transportation Act, all claims for damages by reason of the collection or enforcement by or through the President during the period of federal control, of rates, fares, etc., must be by application to the Commission and not to the court. Section 206,

subdiv. a of the act, provides that actions at law, suits in equity, and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against the carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose. Subdivision B provides for process in such cases; subdivision C, for proceedings before the Commission; subdivision D, that any pending action shall not be abated; subdivision E, for payment of final judgment, decree, or awards in actions, suits, proceedings, or reparation claims; subdivision F takes the period of federal control out of the statute of limitations; and subdivision G forbids an execution against the property of the carrier. In other words, the Transportation Act does not change the jurisdiction of any cause of action on account of the subject matter, but provides for the bringing of proceedings against the agent appointed by the President in the same tribunal which would have had jurisdiction of the subject matter but for federal control. [43]

As the present actions could have been maintained in this court against the carrier if the lines had been in private control at the time the shipments were made, they can proceed against the

agent of the President with reference to shipments moving during the period of federal control.

6. It is urged as to shipments moving subsequent to federal control, that section 208–a, of the Transportation Act legalizes the rates, fares, and charges then in effect, but this provision did not and was not intended to legalize unlawful rates, but to continue in effect only such rates as were authorized by law. The rates involved in this controversy were never lawfully established, and in fact are in violation of section 406 of the Transportation Act.

The demurrer in each case is therefore overruled.

Filed April 4, 1921. G. H. Marsh, Clerk. [44]

AND AFTERWARDS, to wit, on Monday, the 4th day of April, 1921, the same being the 25th judicial day of the regular March term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit. [45]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Minutes of Court—April 4, 1921—Order Overruling Demurrer to Complaint.

This matter coming on to be heard on demurrer of defendant to plaintiff's complaint, the plaintiff appearing by Wilson & Guthrie, his attorneys, and the defendant appearing by A. C. Spencer, J. F. Reilly, and W. A. Robbins, its attorneys, the matter having been fully argued, the Court being fully advised in the premises, it is ORDERED that said demurrer be and the same is hereby overruled, and that defendant have ten (10) days from date hereof within which to serve and file its answer.

Done and dated in open court this 4th day of April, 1921. [46]

AND AFTERWARDS, to wit, on the 20th day of July, 1921, there was duly filed in said court a stipulation amending the complaint, in words and figures as follows, to wit: [47]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Stipulation Amending Complaint.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys as follows:

I.

That plaintiff's complaint may be amended by the addition of a paragraph following paragraph XIII, to be numbered XIII½, as follows:

"That between the 29th day of December, 1917, and the 24th day of June, 1918, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Port-

land Steamship Company over the route hereinabove specified, consigned to Allen & Lewis, the number of carloads of sugar on the dates and of the weights shown in the exhibit attached to stipulation amending complaint, designated as 'Supplementary Exhibit R (Allen & Lewis)' and made a part of this complaint, on all of which defendant received and collected as transportation charge the sum of 15 cents per hundred pounds, together with war tax of 3% thereon; that between the 25th day of June, 1918, and the 29th day of February, 1890, there was shipped from San Francisco to Portland, Oregon, via the line of the San Francisco & Portland Steamship Company over the route hereinabove specified, consigned to Allen & Lewis, the number of carloads of sugar of the dates and weights shown in an exhibit attached to the stipulation amending complaint and described as 'Supplementary Exhibit S (Allen & Lewis)' [48] and made a part of this complaint, on all of which defendant received and collected as transportation charge the sum of 19 cents per hundred pounds, together with war tax of 3% thereon; that all of the said charges above in this paragraph enumerated on the shipments listed were paid by Allen & Lewis, and that said Allen & Lewis has heretofore and for a valuable consideration

sold, assigned, and transferred to the plaintiff all of its right, title, and interest in and to said overcharge and excess war tax and claim against the defendant on all shipments shipped between the dates above specified."

II.

That paragraph VII of defendant's answer may be amended by adding to line 7, of page 3, after the numeral XIII, the numeral XIII½.

JAMES G. WILSON,
Of Attorneys for Plaintiff.
JOHN F. REILLY,
Of Attorneys for Defendant. [49]

AND AFTERWARDS, to wit, on the 23d day of April, 1921, there was duly filed in said court, an answer, in words and figures as follows, to wit: [52]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Answer.

Comes now the above-named defendant and for answer to the complaint of plaintiff herein, admits, denies, and alleges:

I.

Admits all of the allegations contained in paragraph I of plaintiff's complaint.

II.

Denies each and every allegation in paragraph II, except that defendant admits that the United States Railroad Administration was in control of and operating through the Director General of Railroads, the steamers of the San Francisco & Portland Steamship Company from May 30, 1918, to February 29, 1920, and that at the time the complaint was filed herein, defendant was the agent appointed by the President under section 206 of the Transportation Act of 1920, and defendant further denies that he is now such agent.

III.

Denies each and every allegation in paragraph III, except that he admits Oregon-Washington Railroad & Navigation Company filed an application with the Interstate Commerce Commission for permission to continue the ownership and control of a part of the stock of said San Francisco & Portland Steamship Company, and to continue operation of the steamships of said company between San

Francisco and Portland, and that its application was granted. [53]

IV.

Denies each and every allegation contained in paragraph IV, except that he admits that the rates therein mentioned were duly published, and were carried in the tarriffs mentioned on the dates alleged and up to February 29, 1920.

V.

Denies each and every allegation contained in paragraph V, except that this defendant admits that during the time said steamers of San Francisco & Portland Steamship Company were operated by the Director General of Railroads, said Director General charged a greater rate for the transportation of sugar from San Francisco to Portland than that called for in the Oregon-Washington Railroad & Navigation Company and San Francisco & Portland Steamship Company tariff from San Francisco to North Portland, and this defendant further admits that the difference between the rates named in said San Francisco & Portland Steamship Company's tariffs between said points are correctly stated in said paragraph of said complaint.

VI.

Denies each and every allegation contained in paragraph VI, except that he admits that on all shipments handled by said United States Railroad Administration a war tax was collected.

VII.

Denies each and every allegation contained in

paragraphs VII, VIII, IX, X, XI, XII, and XIII, except that he admits that during the time the United States Railroad Administration was operating the steamers of San Francisco & Portland Steamship Company it collected charges on all shipments of sugar from San Francisco to Portland on the basis named in said paragraph, and also collected a war tax thereon at the rate of three per cent., and further admits that the part [54] of said shipment referred to in said paragraphs which are alleged to have been shipped after May 30, 1918, were shipped and were consigned to the consignees named in said paragraphs.

VIII.

Denies each and every allegation contained in paragraphs XIV, XV, XVI, and XVII, except that defendant admits the accuracy of the statements as to rates collected on all shipments of sugar from San Francisco to Astoria; that Astoria is on the route of said steamship company between San Francisco and Portland, and that the part of said shipments referred to in said paragraph which are alleged to have been shipped after May 30, 1918, were shipped to the consignees named.

And for a further, separate, and affirmative answer and defense to the complaint herein, defendant alleges:

That on March 26, 1921, James C. Davis was appointed and succeeded this defendant as Director General of Railroads, and the agent appointed by the President under section 206 of the Transportation Act of 1920, and ever since has been and now

is the said Director General of Railroads, and the said agent, and the defendant herein is no longer such agent.

WHEREFORE, having fully answered, this defendant prays the complaint herein be dismissed, and defendant have judgment for his costs and disbursements herein.

A. C. SPENCER,
JOHN F. REILLY,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

I, John F. Reilly, being first duly sworn, depose and say: That I am one of the attorneys for defendant within named; that I have read the foregoing answer, [55] know the contents thereof, and that the same is true as I verily believe; that I make this verification for the reason that said defendant is absent from the county of Multnomah and state of Oregon.

JOHN F. REILLY.

Subscribed and sworn to before me this 22d of April, 1921.

[Seal] ROSE W. SHENKER,
Notary Public for Oregon.

My commission expires June 26, 1922.

Service by copy admitted at Portland, Oregon, April 23, 1921.

GEO. B. GUTHRIE,
Of Solicitor for Plaintiff.

Filed April 23, 1921. G. H. Marsh, Clerk. [56]

AND AFTERWARDS, to wit, on Tuesday, the 26th day of April, 1921, the same being the 44th judicial day of the regular March term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [57]

In the District Court of the United States for the District of Oregon.

L.–8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant,

Minutes of Court—April 26, 1921—Order of Substitution.

Based upon stipulation of the parties, it is hereby ordered that James C. Davis as agent of the United States Railroad Administration (San Francisco & Portland Steamship Co.) be and he is hereby substituted as defendant for John Barton Payne, Agent of the United States Railroad Administration (San Francisco & Portland Steamship Co.)

Done and dated in open court this 26th day of April, 1921.

CHAS. E. WOLVERTON,
Judge.

Filed April 26th, 1921. G. H. Marsh, Clerk. [58]

AND AFTERWARDS, to wit, on the 20th day of July, 1921, there was duly filed in said court a stipulation waiving jury trial, in words and figures as follows, to wit: [59]

In the District Court of the United States for the District of Oregon.

A. J. PARRINGTON,
Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration,
Defendant.

Stipulation Waiving Jury.

It is hereby stipulated by and between the parties hereto by their respective attorneys that a jury be and is hereby waived in the trial of the above-entitled cause and that the said cause be tried before the court without a jury.

JAMES G. WILSON,
Of Attorneys for Plaintiff.
C. E. COCHRAN,
Of Attorneys for Defendant.

Filed July 20, 1921. G. H. Marsh, Clerk. [60]

AND AFTERWARDS, to wit, on Wednesday, the 20th day of July, 1921, the same being the 15th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [61]

In the District Court of the United States for the District of Oregon.

L.–8747.

July 20, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration,

Defendant.

Minutes of Court—July 20, 1921—Trial.

Now at this day come the plaintiff by Mr. James G. Wilson, of counsel, and the defendant by Mr. C. E. Cochran, of counsel, whereupon upon motion of said parties by their respective counsel, it is ordered that this cause be and it is hereby consolidated for the purpose of trial with cause L.–8748, entitled A. J. Parrington vs. San Francisco & Portland Steamship Company.

Whereupon, this being the day set for the trial of this cause, the parties having filed a written stipulation waiving jury trial herein, said cause

comes on for trial before the Court. And the Court having heard the evidence adduced and the arguments of counsel, it is ordered and adjudged that special findings and judgment be prepared in favor of plaintiff and against defendant herein. [62]

AND AFTERWARDS, to wit, on the 5th day of August, 1921, there was duly filed in said court findings of fact and conclusions of law, in words and figures as follows, to wit: [63]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Findings of Fact and Conclusions of Law.

This matter having come on for trial before the Court without a jury, the parties by their respective attorneys having waived a jury by written stipulation, the plaintiff appearing by his attorney, James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, his attorney, the evidence having been sub-

mitted by both parties, the Court being fully advised, does now make and find from the issues presented by the pleadings and the evidence offered the following

FINDINGS OF FACT.

I.

That from noon of December 28, 1917, to midnight of February 29, 1920, the United States Railroad Administration was in control of the line of steamboats and steamships between San Francisco, California, and Portland, Oregon, belonging to the San Francisco & Portland Steamship Company, and was operating the same as a common carrier in interstate commerce under the authority of the United States Director General of Railroads; that the defendant is the duly appointed, qualified, and acting agent of the United States Railroad Administration and is authorized to represent it in the defense of this action. [64]

II.

That the Oregon, Washington Railroad & Navigation Company, pursuant to section 5 of the act of Congress known as the Act to Regulate Commerce as amended by the act of Congress of August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the Sanitation and Government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock of the San Francisco & Portland Steam-

ship Company for permission to continue the ownership and control, and to continue the operation of the line of steamships and steamboats of the San Francisco & Portland Steamship Company between San Francisco and Portland after the first day of July, 1914, and that on said hearing the Interstate Commerce Commission found that the Oregon-Washington Railroad & Navigation Company was the owner of the stock of said San Francisco & Portland Steamship Company, and that said line was being operated in the interest of the public and was of advantage to the convenience and commerce of the people, and would neither exclude, prevent, nor reduce competition on the route by water between San Francisco and Portland, and granted permission that the said Oregon-Washington Railroad & Navigation Company might continue the operation of said line subsequent to July first, 1914; that said Interstate Commerce Commission in said order granting said permission also ordered the San Francisco & Portland Steamship Company to file with the Commission all of its tariffs, rules, and regulations as required by the Act to Regulate Commerce, and thereafter said San Francisco & Portland Steamship Company did file its tariffs with reference to, among others, the transportation of sugar between San Francisco and Portland, and in conjunction with the Oregon-Washington Railroad & Navigation [65] Company its rates on sugar between San Francisco and

North Portland, Oregon; that in and by said opinion the Interstate Commerce Commission found that Astoria, Oregon, was the only intermediate point between San Francisco and Portland on the route of the San Francisco & Portland Steamship Company.

III.

That prior to taking control of said line of steamboats and steamships by the said United States Railroad Administration, said San Francisco & Portland Steamship Company in conjunction with the Oregon-Washington Railroad & Navigation Company established and filed with the Interstate Commerce Commission a schedule of rates,. including a rate on sugar in carload lots of #30,000 minimum, from San Francisco to North Portland, and that the rate so established was continued in effect and adopted by the United States Railroad Administration during its operation of said line and the operation of the line of the Oregon-Washington Railroad & Navigation Company; that the rate on sugar in carload lots so published, filed, and put into effect was twelve and one-half (12½) cents per hundred pounds at all times between noon of December 28, 1917, and June 24, 1918, inclusive; and was fifteen and one-half (15½) cents per hundred pounds from and including the 25th day of June, 1918, to and inclusive of the 29th day of February, 1920; that the United States Railroad Administration carried from San Francisco to

Portland, Oregon, all of the shipments of sugar listed in the exhibits attached to the complaint and to the stipulation amending the complaint shown as transported between San Francisco and Portland, and all of the shipments of sugar from San Francisco to Astoria, Oregon, on said exhibits listed as transported from San Francisco to Astoria, and on all of such shipments so carried from and including the 29th day of December, 1917, to and including [66] the 24th day of June, 1918, charged and collected for its transportation charges at the rate of fifteen (15) cents per hundred pounds; and on all shipments so shown on said exhibits from and including the 25th day of June, 1918, to and inclusive of the 29th day of February, 1920, charged and collected the sum of nineteen (19) cents per hundred pounds; and in addition to such charges collected and received on all such shipments war tax at the rate of 3% on the freight charged.

IV.

That all of said charges at said rates were paid by the plaintiff's assignors to the United States Railroad Administration; that the amount of the excess charges so collected by the United States Railroad Administration from the plaintiff's assignors between the 29th day of December, 1917, to and inclusive of the 24th day of June, 1918, over and above what said shipments would have earned if charged at the rate in effect from San Francisco

to North Portland was and is the sum of three thousand two hundred and 90/100 dollars ($3,200.90); and the amount of such excess charges so collected by the United States Railroad Administration from and including the 25th day of June, 1918, to and including the 29th day of February, 1920, was and is the sum of four thousand, one hundred thirty-eight and 16/100 dollars ($4,138.16).

V.

That Portland and Astoria, Oregon, are intermediate between San Francisco, California, and North Portland, Oregon, on the route established by the San Francisco & Portland Steamship Company in connection with the Oregon-Washington [67] Railroad & Navigation Company, and continued in effect by the United States Railroad Administration for shipments of sugar between San Francisco and North Portland, and the United States Railroad Administration charged and collected on all of the shipments to Portland and Astoria a greater sum than the rates established by it on shipments of sugar from San Francisco to North Portland, and that said shipments from San Francisco to Portland and Astoria moved over the same route in the same direction, and the haul from San Francisco to Portland and Astoria was included within the haul over the route so established from San Francisco to North Portland, said excess of charges so made being the amount shown in the preceding paragraph.

VI.

That on the 12th day of October, 1917, the United States Shipping Board notified the San Francisco & Portland Steamship Company that it would at noon on October 15, 1917, requisition all steamers of not less than twenty-five hundred tons total dead weight including bunkers, water, and stores, and all passenger steamers of not less than twenty-five hundred tons gross register, and also notified said San Francisco & Portland Steamship Company that "Owners whose steamers are operating in their regular trades are to continue the operation of their steamers for account of the Government as they have been doing for themselves until they receive further instruction," that thereafter formal charters were executed as of October 15, 1917, covering the steamships "Beaver" and "Rose City" owned by the San Francisco & Portland Steamship Company, that on the 24th day of May, 1918, the United States Shipping Board notified the San Francisco & [68] Portland Steamship Company as follows: "Five days' notice is hereby given of the cancellation of the requisition charter on the steamships 'Beaver' and 'Rose City,' and that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to said vessels."

VII.

That the United States Railroad Administration during all of the time from December 29, 1917, to February 2, 1920, on all of the shipment shown in

the exhibits attached to the complaint and to the stipulation amending the complaint, issued its bills of loading whereby it agreed to transport said sugar and collected from plaintiff's assignors the charge for the transportation of said shipment, and did not cancel its tariffs on file with the Interstate Commerce Commission at any time during said period, but at all times accepted shipments under said tariff and collected charges thereon.

VIII.

That the shippers who shipped said sugar over the line of the San Francisco & Portland Steamship Company operated by the United States Railroad Administration as listed on the exhibits attached to plaintiff's complaint and to the stipulation amending plaintiff's complaint have each and all assigned their claims for the collection of said overcharges by the United States Railroad Administration from the said shippers to the plaintiff herein, and he is the lawful owner and holder thereof; that the sum of fifteen hundred dollars ($1500.00) is a reasonable sum to allow the plaintiff as attorney's fees for the collection of said overcharges, said attorney's fee to cover only the work with reference to said collection in this court and not on any appeal therefrom. [69]

From the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the charges collected from the plaintiff's assignors for the transportation of sugar in carload

lots from San Francisco, California, to Portland and Astoria, Oregon, were illegal and in violation of the amended fourth section of the Act to Regulate Commerce to the extent that the same exceeded the rates esablished and in effect from San Francisco to North Portland, Oregon over the line of the San Francisco & Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company at the time of the movement of said respective shipments.

II.

That the United States Railroad Administration having issued its bills of lading and collected the freight charges on shipments between December 28, 1917, and May 29, 1918, was liable to the shippers on such contracts of carriage and collection of charges, notwithstanding the fact that the United States Shipping Board had requisitioned some of the vessels of the San Francisco & Portland Steamship Company.

III.

That the defendant is liable to the plaintiff for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

IV.

That the plaintiff is entitled to judgment against the defendant for the sum of seven thousand three hundred [70] thirty-nine and 6/100 dollars ($7,339.06), together with interest at the rate of six per cent per annum on the sum of three thousand two hundred and 90/100 dollars ($3,200.90) from the

25th day of June, 1918, and together with interest at the rate of six per cent per annum on the sum of four thousand one hundred thirty-eight and 16/100 dollars ($4,138.16) from March first, 1920, and fifteen hundred dollars ($1,500.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein.

Done and dated in open court this 5th day of August, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, July 23, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed August 5, 1921. G. H. Marsh, Clerk. [71]

AND AFTERWARDS, to wit, on Thursday, the 5th day of August, 1921, the same being the 28th judicial day of the regular July term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [72]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Minutes of Court—August 5, 1921—Judgment.

This matter coming on, on application of the plaintiff for the entry of judgment in the above-entitled cause, the plaintiff appearing by his attorney, James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, his attorney, the Court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises,—

It is therefore ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant, James C. Davis, Agent of the United States Railroad Administration, judgment in the sum of seven thousand three hundred thirty-nine and 6/100 dollars ($7,339.06), together with interest at the rate of six per cent per annum on the sum of three thousand two hundred and 90/100 dollars ($3,200.90), from the 25th day of June, 1918, and together with interest at the rate of six per cent per annum on the sum of four thousand one hundred thirty-eight and 16/100 dollars

($4,138.16) from March first, 1920, and fifteen hundred dollars ($1500.00) allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein, taxed and allowed at the sum of $18.61, and it is further ADJUDGED AND ORDERED that the defendant pay said sum promptly to the plaintiff as required by section 206 of the Transportation Act of 1920.

Done and dated in open court this 5th day of August, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, July 23, 1921.

JOHN F. REILLY,
Of Attorneys for Defendant.

Filed August 5, 1921. G. H. Marsh., Clerk. [73]

AND AFTERWARDS, to wit, on the 21st day of September, 1921, there was duly filed in said court, a bill of exceptions, in words and figures as follows, to wit: [74]

In the District Court of the United States for the District of Oregon.

L.–8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent United States Railroad Administration,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on the 20th day of July, 1921, at Portland, Oregon, the above-entitled action came on for trial before the Honorable Robert S. Bean, District Judge; plaintiff appearing by James G. Wilson, and defendant appearing by Charles E. Cochran, respectively the attorneys, and jury by a stipulation in writing filed in this Court was waived and said case tried to the Court.

WHEREUPON the following proceedings were had:

Mr. Wilson offered documentary evidence that plaintiff was the owner by assignment of the claims mentioned in the respective causes of action of the complaint and supplemental complaint, and it was established that plaintiff is the owner of such causes of action.

Mr. WILSON.—I offer in evidence the Proclamation of the President of the United States as contained in 40 Statutes at Large, at page 1733, and the following portion of said Proclamation was read:

> "Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers [75] thereto me enabling, do hereby through Newton T. Baker, Secretary of War, take possession and assume control, at 12 o'clock noon, on December 28, 1917, of each and every system of transportation and the appurtenances thereof, located wholly or in part within

the boundaries of the Continental United States, and consisting of railroads, and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon, or operated as a part of such rail or combined rail and water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion, so far as may be necessary, of all other traffic thereon; and that, so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interests may require, and of the usual and ordinary business and duties of common carriers."

Mr. WILSON.—I offer in evidence a copy of the opinion and order of the Interstate Commerce Commission on application of Oregon-Washington Railroad & Navigation Company, under the provisions of Section 5 of the Act to Regulate Commerce as amended by the Panama Canal Act in connection with the ownership of The San Francisco and Portland Steamship Company. The opinion is not certified but is reported in 34 I. C. C. 165.

Mr. COCHRAN.—We object to the document as immaterial and irrelevant in that its subject matter has no part in the proof of plaintiff's claim against the Director General of Railroad, but we [76] do not make a point upon the fact that the document appears to be uncertified, and that plaintiff not being a party to the proceedings before the Interstate Commerce Commission is neither bound or benefited by that decision.

COURT.—Admitted, subject to objection.

The document was marked Plaintiff's Exhibit 2 and is physically attached to plaintiff's bill of exceptions and made a part hereof.

Testimony of A. J. Parrington, on His Own Behalf.

A. J. PARRINGTON, plaintiff, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination by Mr. WILSON.

My name is A. J. Parrington; residence, Portland, Oregon; business, Traffic Attorney for about twelve years. I have been employed in the Traffic Department in various capacities with different railroads, the last with the Oregon-Washington Railroad & Navigation Company for the past twelve years. My work had consisted almost solely in the preparation and reading of tariffs. I have a map showing the location of the line of The San Francisco and Portland Steamship Company.

This document was marked Plaintiff's Exhibit 3 for identification.

(Testimony of A. J. Parrington.)

The witness marked upon Exhibit 3 the location of Astoria with letter "A," the city of Portland with letter "B," and the location of North Portland with letter "C."'

The route of The San Francisco and Portland Steamship Company from San Francisco to Portland is as follows:

Passing through the Golden Gate to the Pacific Ocean, thence to the mouth of Columbia River, thence into this river to Astoria, thence up Columbia River to Willamette River, thence to Portland, Oregon. North Portland is located about five miles above the junction [77] of the Willamette and Columbia Rivers on what is called Columbia Slough.

Thereupon counsel for plaintiff inquired as follows:

Q. Is it on the route of The San Francisco and Portland Steamship Company?

Mr. COCHRAN.—I object to that as immaterial.

COURT.—Objection overruled.

To which ruling counsel for defendant excepted and its exception was duly allowed.

A. It is not.

The witness then testified further that the steamers of The San Francisco and Portland Steamship Company do not stop at North Portland, nor do the tariffs of said Company name rates to North Portland. The San Francisco and Portland Steamship Company during the times referred to in the complaint was party to certain tariffs naming rates from San Francisco to North Portland. They are

(Testimony of A. J. Parrington.)

Oregon-Washington Railroad & Navigation Company's tariff No. 131–A, I. C. C. 384, effective February 17, 1916, Item 445 of the tariff which names rates on sugar from San Francisco to North Portland of 12½¢ provides "via route No. 1 as shown on Page 34" under the caption of "Routing" shows Route No. 1 via The San Francisco and Portland Steamship Company to Portland, Oregon, and Oregon-Washington Railroad & Navigation Company from Portland to North Portland.

Mr. WILSON.—It is admitted in the pleadings that the Oregon-Washington Railroad & Navigation Company's line of railroad extends from Portland to North Portland.

The witness continued: Item 445 of the tariff naming rates from San Francisco to North Portland of 12½¢ for 100 pounds on sugar, carload lots, minimum weight 30,000 lbs., continued in effect from February 17, 1916, to June 24, 1918. [78] On June 25, 1918, a special supplement No. 14 to the same traiff increased the rates from 12½¢ to 15¢. That change was authorized by the Director General of Railroads under General Order No. 28 which advanced with few exceptions all rates over the entire United States 25 per cent. The 15½¢ rate continued in effect until the expiration of the tariff July 4, 1919. Thereafter the rates were carried in the Oregon-Washington Railroad & Navigation Lines' Tariff No. 131–B, I. C. C. No. 589, effective July 4, 1919, Item 460 of that tariff continued the rate from

(Testimony of A. J. Parrington.)

San Francisco to North Portland of 15½¢ via Route No. 1 as shown on page 36 of the tariff. Route No. 1 as shown on page 36 of the tariff provides that movement northbound would be via San Francisco and Portland Steamship line, Portland, Oregon, and Oregon-Washington Railroad & Navigation Company. That rate was continued in effect up to and including August 25th, 1920, by Supplement No. 8 to the same tariff, effective August 26, 1920, the rate of 15½¢ was increased to 19½¢. This increase is the result of the Interstate Commerce Commission decision in Ex parte 74, 58 I. C. C. Reports 220. The rates in that tariff were continued to January 15, 1921, and thereafter the same rate was carried in S. J. Henry Tariff No. 2-A, I. C. C. 35, effective January 15th, 1921.

These tariffs were admitted in evidence and marked Plaintiff's Exhibit 4.

STIPULATION OF COUNSEL.

It is stipulated and agreed that in making up the final record the material parts of these tariffs, as read by the witness, may be copied at length in the record with the same evidential effect as the original documents.

The witness continued: The rate on sugar from San Francisco to North Portland was [79] increased by Supplement No. 3 to North Pacific Coast Freight Bureau Tariff No. 2, I. C. C. No. 35, by S. J. Henry, Agent, from 19½¢ to 24¢, effective April 30th, 1921.

The witness continued: The rates actually

(Testimony of A. J. Parrington.)

charged on the sugar movement from San Francisco, California, to Portland, Oregon, was as follows:

From May 1, 1915, to May 10, 1916, 12½¢ per 100 lbs.

From May 10, 1916, to June 24, 1918, 15¢ per 100 lbs.

From June 25, 1918, to Aug. 25, 1920, 19¢ per 100 lbs.

From Aug. 26, 1920, to July 10, 1921, 24¢ per 100 lbs.

There are no shipments described in the complaint subsequent to the last mentioned date.

The witness continued: At North Portland the Swift Packing Company used sugar in pickling their meats. I understand they are large consumers. The movement of sugar by the Railroad Administration to Portland moves from San Francisco to Portland via the same boats over the same route. With respect to shipments of sugar to Astoria, the tariffs provide the same rates as to Portland during the periods covered by the tariffs hereinbefore read. Shipments to Astoria as far as they go move over the same route from San Francisco as those to North Portland.

The witness continued: I have a document which is the original shipping receipt or bill of lading issued by The San Francisco and Portland Steamship Company, dated San Francisco, December 1, 1917, issued by F. O. Schullerts, Agent, The San Francisco and Portland Steamship Company at San Francisco.

(Testimony of A. J. Parrington.)

(Document offered in evidence marked Plaintiff's Exhibit 5.)

Mr. WILSON.—I have numerous expense bill receipts of The San Francisco and Portland Steamship Company subsequent to October 12, 1917. I offer in evidence expense bill of The San Francisco and [80] Portland Steamship Company showing receipt of payment of transportation charges on sugar issued to Mason, Ehrman & Company, December 5, 1917, being within the period which is involved in these cases.

(Document received in evidence marked Plaintiff's Exhibit 6.)

Mr. WILSON.—I have receipts representing each shipment mentioned in the complaint.

Mr. COCHRAN.—Show me one of those from the Railroad Administration.

(Mr. Wilson shows one.)

Mr. COCHRAN.—I will agree that receipts from forms similar to Plaintiff's Exhibit 6 were issued in respect to each shipment mentioned in the complaint against the Director General of Railroads, and against Mr. James C. Davis, Agent. I will also agree that Plaintiff's Exhibit 6 in substance and effect may be considered as the type of those receipts without the necessity of producing the original, but I deny the legal effect claimed by counsel, and will contend that the San Francisco and Portland Steamship Company since October 12th, 1917, to May 29th, 1918, was acting solely as agent for the United States Shipping Board or the United States

(Testimony of A. J. Parrington.)

Shipping Board Emergency Fleet Corporation pursuant to requisitions by Mr. Bainbridge Colby, Commissioner, and charter-parties subsequently entered into, effective October 12th, 1917, which documents will be subsequently offered in evidence.

Q. (By Mr. WILSON.) Mr. Parrington, do you keep a file of all tariffs with reference to shipments in this locality?

A. I have practically a complete set of tariffs covering this territory.

Q. Did you ever receive any notice, or do your tariffs show that any cancellation of the tariffs of The San Francisco and Portland Steamship Company on October 12, 1917, or any subsequent date, was made? Between that and May, 1918? [81]

A. The San Francisco and Portland Steamship Company's northbound freight tariff No. 4, I. C. C. No. 10, was in effect at the time—at all times between August 4, 1914, and February 20, 1920.

Q. No cancellation?

A. The tariff was supplemented during that time, but at no time does the Emergency Fleet Corporation, or the United States Shipping Board appear as a party to the tariff. Nor does The San Francisco and Portland Steamship Company appear as agent for the United States Shipping Board Emergency Fleet Corporation.

Q. Now, Mr. Parrington, I will ask you whether or not in any of these tariffs which you have referred to as naming rates to Portland, there is contained on the title page a reference to any order of

(Testimony of A. J. Parrington.)

the Commission authorizing The San Francisco and Portland Steamship Company to charge more for the carriage of sugar to Portland than it participated in rates on the same commodity to North Portland?

A. It does not.

Q. Have you with you Tariff Circular 18-A of the Interstate Commerce Commission?

A. I have.

Mr. WILSON.—I would like to offer in evidence and read in evidence the requirements of the Interstate Commerce Commission with reference to showing on tariffs any authority for violation of the long and short haul clause. It is a part of Rule 77 of Tariff Circular 18-A of the rulings of the Interstate Commerce Commission, and reads as follows:

"When the Commission has issued an order granting to a carrier authority to depart from the provisions of the amended fourth section of the Act, and to charge higher rates or fares for shorter than for longer distance over the same line or route, the title page of each tariff issued and filed under such authority must bear [82] the following notations: 'This tariff contains rates (fares) that are higher for shorter distance than for longer distance over the same route. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Order FS. No. —— of (date) 19 ——,' When the Commission has issued an order granting a carrier authority to depart from the provisions of the amended fourth section of the Act and to charge

(Testimony of A. J. Parrington.)

rates or fares higher than the aggregate of the intermediate rate, or fares subject to the rate, title page of each tariff issued and filed under such authority, must bear the following notation: 'This tariff contains rates (or fares) that exceed the sums of the interstate rates (or fares) subject to the Act. Such departure from the terms of the amended fourth section of the Act to Regulate Commerce is permitted by authority of Interstate Commerce Commission Order FS. No. —— of (date) 19——.' Nothing in this rule may be considered as waiving any provisions of the amended fourth section of the Act to Regulate Commerce."

Cross-examination.

(Questions by Mr. COCHRAN.)

Q. Here is a document which has been marked for identification, Defendant's Exhibit "A," having the purport of being the map of Portland Harbor. I will ask you to examine the document and say if you agree with me that it is such map, and fairly and correctly represents the location of Portland Harbor—indeed, that the map is what it purports to be.

A. It is.

(The document was offered in evidence, received and marked Defendant's Exhibit "A" and is attached to this bill of exceptions and made a part hereof.)

The witness continued: [83]

The scale on the map has graduated up to 4,000 feet.

STIPULATION OF COUNSEL.

It is agreed between counsel that on Defendant's Exhibit "A" the scale of the map is 2¼ inches equals 4,000 feet.

The witness in respect to Defendant's Exhibit "A" further testified:

The portion of the map marked "Columbia River," and the junction of Columbia River with another river marked "Willamette River" represents the junction of these two rivers, and is the place where a steamship carrying cargo from San Francisco, via Columbia River, to Portland would depart from the Columbia River to enter the Willamette River. The portion marked "North Portland Harbor" is the place which I referred to in my direct examination as "Columbia Slough." North Portland is located on Defendant's Exhibit "A" as approximately 12 inches from the junction of the river, and what is shown as North Portland Harbor, and I will mark North Portland with the letter "C" which is the same description used upon Plaintiff's Exhibit 3. The lines shown upon defendant's Exhibit "A" as "City Boundary" represents the corporate limits of the City of Portland. There is a line of railroad extending from North Portland, owned by the Oregon-Washington Railroad & Navigation Company, to a junction which is marked with the letter "J" upon Exhibit "A," and then extends over to the Willamette River in a rather westerly direction to a place called Municipal Terminal No. 4. There is also a line of railroad

(Testimony of A. J. Parrington.)

extending from North Portland from point "C" on Defendant's Exhibit "A" over the same route to the junction which has been marked "J," and there goes straight on south into the City of Portland up to the yards and through the terminal to Albina Yards, which is shown on the exhibits as "O.-W. R. & N. Co. Albina Yards," and to various terminals, docks and warehouses as shown upon the map. The berth of the steamships of The San Francisco and [84] Portland Steamship Company in Portland is Ainsworth Dock, located on the west side of the Williamette River between the Broadway and Steel Bridges. It is connected with tracks of the Northern Pacific Terminal Company. Transfer from ship to rail is usually at Ainsworth Dock. I know transfers were made at Ainsworth Dock, but we don't claim transfer of this sugar.

Q. (By Mr. COCHRAN.) Do you know, as a matter of fact, that the Steamship Company unloads at any of these docks along the river from Municipal Terminal No. 4 clear up to the other Municipal Terminals on this Exhibit "A," don't you?

A. The tariffs of the company provide that the steamships will stop at one or more flour mills for cargo of a certain amount. They will not stop at miscellaneous docks for small cargo, either to take on or discharge cargo, a few carloads. They specify the number of tons for which they will call at a dock, and I believe it is in the neighborhood of 400 tons.

Q. Here is a ruler. Will you tell us the distance

(Testimony of A. J. Parrington.)

from the water connection with rail at Municipal Terminal No. 4 up to the Ainsworth Dock, which is marked on this Exhibit "A" as No. 57?

A. It is approximately 22 inches.

Q. Twenty-two inches upon the map. The other is approximately 12 inches?

A. Twelve inches.

Q. Now, tell us the difference from Municipal Terminal No. 4 by rail to North Portland.

A. That is a varying line and you can measure only straight; can only get an approximate distance, approximately 11 inches upon the map.

Q. Now, the distance upon the ground would be those inches multiplied [85] by 4,000 feet?

A. It would.

Redirect Examination by Mr. WILSON.

At the various docks here in the City of Portland, to which reference has been made, that the company will stop for cargo of a certain amount, which you say you think is 400 tons, does the Portland rate apply at all these docks wherever they land?

A. It does.

Q. Is there any place between the mouth of the Columbia River and the Ainsworth Dock, the regular berth of these steamers, where the rate is shown by the tariff as anything less than the Portland rate? A. No.

Recross-examination by Mr. COCHRAN.

Swift & Company, at North Portland, do not buy

(Testimony of A. J. Parrington.)

sugar for the purpose of selling it to the trade. They merely use it in the pickling and preserving of their meats. There is no business at North Portland of the type of my assignors, such as Allen & Lewis, Mason, Ehrman & Company, and the Pacific Coast Biscuit Company, but the rate is there for their use if they choose to distribute from there.

Redirect Examination by Mr. WILSON.

The tariff makes no distinction between sugar for curing ham and sugar for preserving bought here in Portland. Sugar is sugar under the tariff, and it all moves under that rate, whether it is of the character they use in curing hams or the character they use for the table.

COURT.—Is North Portland Harbor, as marked on that map, Plaintiff's Exhibit "A," navigable for boats the size of those operated [86] by the Steamship Company as far as North Portland?

A. I could not answer that question.

Mr. WILSON.—I think the lumber schooners go in there for the Monarch Mills.

A. I believe. I have no knowledge.

Mr. COCHRAN.—Our steamers, I understand, have put in there at North Portland.

COURT.—Your steamers have?

A. Yes.

COURT.—Regularly? All steamers north?

Mr. COCHRAN.—I don't think regularly, your Honor. I think probably only during high water.

(Testimony of James G. Wilson.)

Mr. Mount, our Assistant General Freight Agent, tells me there is ample water for all boats drawing up to 16 feet, I think, to go up there, but our general course, however, is Willamette and Columbia Rivers, not into these sloughs.

Testimony of James G. Wilson, for Plaintiff.

JAMES G. WILSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows, without interrogation:

Mr. COCHRAN.—I will admit counsel is an attorney of this court, and has had many years of experience in commerce procedure and trial of cases, and is familiar with cases of this kind.

Mr. WILSON.—I have been the attorney for plaintiff since the inception of this case. There are involved in this case a great many overcharges on separate bills. I assume there will be approximately—the overcharges will average, perhaps $18 to $20 on each shipment. It involves the examination and preparation of a great many expense bills, bills of lading and considerable time in the preparation of the case. In addition to that, there has been involved argument on demurrer. For the preparation of that, the time involved was, I should say, ten days or two weeks. Briefs were filed, and a considerable amount of work involved with them. There is [87] involved in this case approximately $7,500.00 of overcharges, and I think

(Testimony of A. J. Parrington.)

$1500.00 is a reasonable attorney's fee for the Court to assess.

Testimony of A. J. Parrington, on His Own Behalf (Recalled).

A. J. PARRINGTON, plaintiff, recalled as a witness on his own behalf, testified as follows:

Direct Examination.

While on the stand previously I spoke about the tariffs of The San Francisco and Portland Steamship Company providing for stopping at other wharves in the city of Portland for delivery or reception of traffic of a certain amount. I have the tariffs with me. As showing the practice of the San Francisco and Portland Steamship Company relative to picking up freight or delivering freight at outside docks other than their regular place of landing, I read from the San Francisco and Portland Steamship Company's South-Bound Local Freight Tariff No. 5, I. C. C. No. 11, under the title of "Absorption," Paragraph A:

> "When shipments of barley, flaxseed, oats, rye, wheat, or mill feed in lots of 200 tons or over are accepted, the Company may at its option, send its steamers to outside docks at Portland to receive such grain or mill feed, in which event, no charge in addition to the freight rate as shown herein will be made."

Paragraph D under the same caption reads as follows:

(Testimony of A. J. Parrington.)

"On freight in carload lots, originating at points outside of Portland or Astoria, Oregon, delivered at this Company's regular place of landing in Portland or Astoria, and shipped under regular bill of lading from Portland or Astoria to San Francisco, the cost of unloading such freight from cars and charging for switching such cars from railroad to such landing at Portland or Astoria, will be assumed by this company when the tariffs providing for the absorption of such is legally on file at the Interstate Commerce Commission."

There is no provision for picking up or delivering freight at docks or landing places other than the regular landing place in the northbound tariff. [88]

Cross-examination by Mr. COCHRAN.

Will you refer to the tariff, northbound tariff, San Francisco and Portland Steamship Company No. 4, I. C. C. No. 10, and see whether or not there is anything in that tariff which indicates the rates solely to the regular landing place or berth of the steamers.

A. By inference only. There is no mention of the regular landing place, but it does mention dock. By "dock" you would infer the regular dock.

Q. That is your inference. Where does it mention dock?

A. Well, in the second paragraph on third re-

(Testimony of A. J. Parrington.)

vision, page 3, under the caption of "Absorption."

Q. That is southbound tariff?

A. No, this is northbound tariff, the one you just referred to.

Q. Now, you have referred to a paragraph entitled "Absorption" on page 3, of the northbound local freight tariff of the San Francisco and Portland Steamship Company.

A. Yes, third page, No. 3.

Q. Which reads as follows: "On freight in carload lots"—

A. Just a moment. The second paragraph I referred to.

Q. I am reading the first: "On freight in carload lots originating at points outside of San Francisco, delivered in cars at this company's regular landing place in San Francisco, and shipped under local bill of lading from San Francisco to Astoria and Portland, Oregon, the switching charges in San Francisco assessed by the California State Belt Railroad and the expense of car unloading, will be assumed by this company." Now, you observe nothing there that relates to Portland, do you?

A. Only shipments which are destined to Portland it covers.

Q. But there is nothing about the point of delivery in Portland being tied up specifically to a regular landing place in Portland, [89] is there?

A. No.

(Testimony of A. J. Parrington.)

Q. Now, the next paragraph: "On northbound carload freight, consigned to firms located on industrial tracks, this company will, when consignees desire to take delivery by switching freight in cars from dock to warehouse, load such freight into cars free of charge." Now, there isn't a word there said about a particular landing place, is there? So if a man had freight going to North Portland, this company agrees there if he desires to switch in freight-cars to load into the freight-cars free of charge. That could be accomplished on Municipal Terminal No. 4, couldn't it? A. It could.

Q. Or any other dock, whether it was the regular landing place or not? A. It could.

Witness rests.

Testimony of J. W. Mount, for Defendant.

J. W. MOUNT, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination by Mr. COCHRAN.

I am Assistant General Freight Agent of the Union Pacific System, Portland, Oregon. This system includes The San Francisco and Portland Steamship Company. During Federal control of railroads I was Special Examiner for the Portland District Freight Traffic Committee of the United States Railroad Administration. I have been engaged in handling tariffs and traffic in the traffic

(Testimony of J. W. Mount.)

department of the transportation companies approximately twenty years, and am acquainted with traffic matters, tariffs, their making, how the amounts of charges are arrived at, and have had experience in determining the reasonableness of rates. I am acquainted with the Steamship [90] Company's rates from San Francisco to Portland, also the rates by rail lines from San Francisco to Portland, and have made comparisons between the two. The water rate from San Francisco to Portland, carloads, on May 10, 1916, was 15 cents per 100 pounds. The rate by Southern Pacific on the same commodity from San Francisco to Portland was 20 cents per 100 pounds. The normal rate on sugar by water on this date was the fifth-class rate. The normal basis of rates were departed from for different reasons, and in this particular instance the commodity rate was less than the normal class rate to meet competition of steam schooners and other lines of steamships operating between San Francisco and Portland, who do not file their tariffs with the Interstate Commerce Commission. I have particularly in mind the steamship lines of the Parr McCormick Company. Their business is the transportation of lumber from Portland to San Francisco, but they bring cargo northbound. By operating in this manner cargo affords ballast as well as reducing operating expenses. They are permitted to make a very low rate. The rate on sugar

(Testimony of J. W. Mount.)

from San Francisco to Portland via water line was really below normal and reasonable rate in that it was established to meet competitive conditions over which they had no control or over carriers which were not subject to governmental control, and who could make rates at their pleasure. There is no competition at North Portland with any of plaintiff's assignors in the line of similar business dealing in sugar at that point.

Cross-examination by Mr. WILSON.

Municipal Dock No. 4 is located at St. Johns Terminal, ordinarily referred to as St. Johns Terminal. It is on the line of Oregon-Washington Railroad & Navigation Company. Rule 20 of The San Francisco and Portland Steamship Company's Northbound Local Tariff No. 8 naming class and commodity rates from San Francisco and Portland effective [91] August 25, 1920, reads as follows:

> "On carload freight, billed to rail points beyond Astoria or Portland, Oregon, the cost of loading such freight in cars together with cost (as lawfully on file with the Interstate Commerce Commission and when such charge is not absorbed by connecting carrier) of switching such cars from this carrier's regular place of landing at Astoria or Portland to the railroad, will be assumed by this carrier."

There is a note immediately following this rule which reads as follows:

(Testimony of J. W. Mount.)

> "Note: The St. Johns (or Peninsula) Tunnel and Willbridge, Oregon, will be considered hereunder a 'rail point beyond Portland, Oregon.' "

Willbridge is opposite St. Johns on the west side of Willamette River, on the line of the Spokane, Portland & Seattle Railway Company. The San Francisco and Portland Steamship Company gets out circulars the same as other lines, advertising matter, that its place of leaving and landing is Ainsworth Dock, foot of Second Street, for passengers only, that is, not for freight. This circular says that Portland sailings will be from Ainsworth Dock, foot of Second Street, and I never knew them to take passengers at any other place but Ainsworth Dock, but they take freight at different places in the City of Portland. The amount of freight to be received at other places in the City of Portland is left largely to the discretion of the General Manager of the company, but they don't obligate themselves to stop for anything less than 200 tons; and that only at the Steamship Company's option. It has a right to get freight at all points in the city at its option. The tariffs make the broad statement that the rates apply between San Francisco and Portland, and, of course, Portland includes a large terminal territory, but it does not include North Portland. The San Francisco and Portland Steamship Company does not publish

(Testimony of J. W. Mount.)

any rate to North Portland except it is a party to tariffs naming rates [92] to North Portland in connection with rail haul transferred at Portland.

Redirect Examination by Mr. COCHRAN.

The situation, summing it up, is that the tariffs recite charges on sugar, for example, The San Francisco and Portland Steamship Company's haulage from San Francisco to Portland without stating in these tariffs as to what part of Portland it will be received or delivered. The combination tariffs filed by Oregon-Washington Railroad & Navigation Company on behalf of itself and of the Steamship Company, which have been referred to here as being in effect during the time the various shipments moved between San Francisco and North Portland plainly says San Francisco and Portland Steamship Company, Portland, Oregon, and Oregon-Washington Railroad & Navigation Company. These tariffs would be complied with on a shipment moving from San Francisco to North Portland if the Steamship Company shall have passed the traffic over Municipal Terminal No. 4 as a connection between water and rail line bound for North Portland. There is a line of railroad extending from North Portland to Municipal Terminal No. 4 owned by the Oregon-Washington Railroad & Navigation Company, and likewise a line of railroad from North Portland up into the business section of Portland around the Albina Yards and

(Testimony of J. W. Mount.)

across the Willamette River by a railroad bridge to a connection with the tracks of the Northern Pacific Terminal Company in Portland, and thence to the Ainsworth Dock on the west bank of the Willamette River. The distance from San Francisco to North Portland via Municipal Terminal No. 4 is shorter than the distance from San Francisco to the Ainsworth Dock in Portland, Oregon, although it is possible because of the tracks being physically laid that way for traffic, if any, shall have moved from San Francisco to North Portland to come over the Ainsworth Dock, that is, come up by water to the Ainsworth Dock, pass over the dock to rail connection, and [93] *and* thence to North Portland, and the same movement is possible if traffic shall have still moved from Municipal Terminal No. 4.

The witness then examined Defendant's Exhibit "A" for the purpose of identifying it a little stronger than was done by the witness Parrington.

Defendant's Exhibit "A" contains a legend index to Port Facilities. No. 2 in this index refers to "Portland Municipal Terminal No. 4, Grain Elevators, etc.," and upon the map in a small circle at Municipal Terminal No. 4 is a figure 2. Likewise on the map are a number of small circles with figures therein which will furnish an index to ascertain the name of the facility to which the figures refer. Ainsworth Dock is marked "No. 57," and by finding the figures 57 in a circle upon Exhibit

(Testimony of J. W. Mount.)

"A" will give us the location of Ainsworth Dock. The red line extending from North Portland south, which crosses the Willamette River, and marked "Spokane, Portland & Seattle Railroad" correctly shows the relative location of that line. Summing up the situation, North Portland is more distant from San Francisco than Portland by a route passing from Ainsworth Dock, and it is less distant by a route passing over Municipal Terminal No. 4, and the tariffs in effect at the time of the movement of these various shipments mentioned in the complaint permit either movement, that is, via Ainsworth Dock to rail connection, or via Municipal Terminal No. 4 to a rail connection.

Recross-examination by Mr. WILSON.

As far as the tariffs are concerned and as far as the rates are concerned, it is possible for every shipment moving by The San Francisco and Portland Steamship Company and thence by Oregon-Washington Railroad & Navigation Company to North Portland to move through the Ainsworth Dock. [94]

Thereupon Mr. Wilson asked witness the following question:

Q. And that would be the natural and customary route, would it not?

Mr. COCHRAN.—I object to that as immaterial. We have a law question involved as to whether Portland is intermediate to North Portland.

(Testimony of J. W. Mount.)

COURT.—That is a question of fact, isn't it?

Mr. COCHRAN.—A question of fact, yes, but it is to be determined not by what is possible. There are no shipments from San Francisco to North Portland.

COURT.—He can answer the question.

To which ruling defendant excepted, and his exception was duly allowed.

A. I will answer it by saying yes.

The municipal authorities of the City of Portland operating Municipal Dock No. 4 do not file tariffs with the Interstate Commerce Commission. They simply publish a wharf charge not subject to the Act to Regulate Commerce.

Thereupon the following questions and answers were given:

Q. If the San Francisco and Portland Steamship Company, in connection with the Oregon-Washington Railroad & Navigation Company, was moving over the Municipal Dock, does it publish any charge in connection with use of the Municipal Dock? Or does it absorb it? A. Municipal Dock?

Q. Yes, No. 4.

A. I have just stated I am not familiar with their tariffs because they change oftener than the moon does.

Q. I am asking you the O.-W. R. & N. tariff under which you say it could move through the Municipal Dock—I am asking you whether or not

(Testimony of J. W. Mount.)

in the O.-W. R. & N. Company, or The San Francisco and Portland Steamship [95] Company publishes anything in regard to the use of the terminal, or the taking of the stuff over the terminal? A. Yes.

Q. What is it?

A. If the through rate includes any—if we have a through rate published from San Francisco to Portland, it would include the charges at Municipal Dock Terminal No. 4.

Q. Does it publish anything? You know there is a charge made there for every ton that goes over the Municipal Dock. The city gets a charge on it.

A. They get a charge from somebody, yes, but on a through rate from San Francisco to Portland, or San Francisco to North Portland via Municipal Dock No. 4, the O.-W. R. & N. Company would have absorbed that charge.

Q. They don't publish any such absorption, do they?

A. The through rate is the absorption itself.

Q. But do they publish they will absorb any such charge?

A. Well, the rate itself includes it. We couldn't publish a rate—we don't say will be any charge. That is the way we publish the rate, we publish it through.

Q. All right. Then you say your tariff does not publish the absorption of any charge at the Municipal Wharf?

(Testimony of J. W. Mount.)

A. No, sir; I don't say so. I say that the rate itself includes that charge. When you publish a through rate between two points, that means we have to perform the service to get from that one point to the other; that is self-evident. If you were shipping freight and paying freight charge, and the tariff was a rate from San Francisco to North Portland of say, 15 cents per hundred, you would not pay more, and we couldn't collect more. We can only collect what we file with the Commission. [96]

Q. If the City of Portland publishes this charge, somebody has to pay.

A. If we in our tariff say we will handle a shipment from San Francisco to North Portland for 15 cents, not going to charge wharfage or switching or anything; that includes all service performed.

Q. Do you publish the fact in your tariff you will absorb any charge at the Municipal Wharf for any tonnage that goes across the wharf?

A. You mean do we by specific expressions say that?

Q. Yes, I do.

A. We don't come out and specially say so, because we don't have to, and because—

Q. That is a matter of law whether you have to or not.

A. Let me finish my answer. As an expert tariff man for the past 12 or 15 years, it has been my practice when I publish a through rate from one point

(Testimony of J. W. Mount.)

to another, that includes all service incident to getting that traffic from Point A to Point B, for instance.

Q. You don't specifically publish, however, in case it goes over the Municipal Dock that you will absorb that charge?

A. It is so stated when you publish the rate.

Q. But you do have facilities whereby you can handle it over your own property, don't you?

A. Yes, we could do it.

Q. And that is the way you ordinarily do it, isn't it?

A. Not altogether.

The witness continued: All sugar going on the Oregon-Washington Railroad & Navigation Company's line coming into the City of Portland by boat is ordinarily transferred at Ainsworth Dock. I merely mean to say that physically sugar can transfer from water to rail at Municipal Dock No. 4, and [97] that it is just as good if not a better physical connection than at Ainsworth Dock.

Testimony of Charles E. Cochran, for Defendant.

CHARLES E. COCHRAN, attorney for defendant, called as a witness on behalf of defendant testified as follows, without interrogatories:

Mr. COCHRAN.—I am Secretary of The San Francisco and Portland Steamship Company, and have been such since about August, 1918. I have been, however, since 1912, one of the attorneys for this company, and have handled its business in connection with these contracts, and the like, and am

(Testimony of Charles E. Cochran.)

acquainted with its relationship with the United States Shipping Board. I have in my hand a telegram having the purport of being dated October 12, 1917, from Washington, D. C., addressed to The San Francisco and Portland Steamship Company, signed by Bainbridge Colby, Commissioner. This telegram is a part of the records and files of The San Francisco and Portland Steamship Company, and I have been acquainted with it since the time of its receipt in 1917 till the present time. I offer the document in evidence, and ask to have it marked as Defendant's Exhibit "B," and would like to substitute copy and withdraw the original, so that the copy may have the same force and effect as the original.

Mr. WILSON.—I object to the offer on the ground that the telegram is irrelevant and immaterial to this controversy. I don't object to the fact that the telegram is not identified, if Mr. Cochran says it is the original telegram.

Mr. COCHRAN.—It is the original telegram.

COURT.—It will be admitted subject to your objection.

Exception saved.

(Marked Defendant's Exhibit "B.")

Mr. COCHRAN—(Reading:)

Defendant's Exhibit "B."

"Washington, D. C., October 12, 1917.

San Francisco & Portland SS Co.,

Pier 40, San Francisco, California. [98]

The United States Shipping Board hereby gives notice to all owners of ships registered and enrolled

under the laws of the United States that the requisition of all American steamers described below, and of which previous announcement has been made, will become operative and effective on October 15, 1917, at noon.

1. The ships affected by said requisition and included therein are (A) all cargo ships able to carry not less than 2,500 tons total dead weight, including bunkers, water and stores.

(B) All passenger steamers of not less than 2,500 tons gross register.

2. (A) As to all steamers in or bound to American ports on October 15, 1917, requisition becomes effective after discharge of inland cargo and ship is put in ordinary good condition.

(B) As to steamers which have started to load their outward cargo requisition becomes effective at noon on October 15, 1917, and accounts as to hire and expenses will be adjusted from time steamer began to load.

3. Steamers, trading to and from American ports that have sailed on their voyage prior to October 15, 1917, at noon, are to complete that voyage as promptly as possible and report for requisitioning.

4. Steamers that are occupied in trades between foreign ports shall be requisitioned as of October 15, 1917, at noon, and accounts adjusted accordingly.

5. (A) Owners whose steamers are operating in their regular trades are to continue the operations of their steamer for account of the government as they have been doing for themselves, until they received further instructions.

(B) Owners, whose steamers are chartered to others, will apply to the Shipping Board for instructions regarding the future [99] employment of said steamers. Acknowledge.

(Signed) BAINBRIDGE COLBY,
Commissioner."

Mr. COCHRAN.—Now, the steamer "Rose City" had a capacity of 2,800 tons dead weight, and the steamer "Beaver" was 2,500 tons dead weight. When that telegram was received, Mr. Blair, our general manager, turned the ships over to the Government, and began operating for the Government, pursuant to the last paragraph, pursuant to Paragraph 5-A of the telegram, directing owners whose steamers are operating in their regular trade to continue operation of their steamers for account of the Government as they have been doing for themselves, until they received further instructions. The steamers were thus operated until the month of January, 1918, when the United States Shipping Board and The San Francisco and Portland Steamship Company signed up a requisition.

Mr. WILSON.—I would like an objection and exception to all of this.

COURT.—Yes.

Mr. COCHRAN.—A requisition charter-party of which I have in my hand the originals. Each boat was made the subject of a requisition charter, and I would like to offer these charter-parties in evidence, substituting copies for the originals, and

withdrawing the originals, the copies to have the force and effect the originals would have.

Mr. WILSON.—I object to the offer on the ground that the same are immaterial and irrelevant to this controversy.

COURT.—Admitted subject to your objection.

Mr. COCHRAN.—I would like to have them marked respectively, that of the steamer "Beaver," "C," and that of the "Rose City," "D."

(Marked Defendant's Exhibits "C" and "D.")

Mr. COCHRAN.—The part of which to which I specially desire to direct your attention reads as follows: "This requisition charter made [100] and concluded upon in the District of Columbia the 14th day of January, 1918, between the San Francisco and Portland Steamship Company of Utah, owner of the good American single-screw steamship 'Beaver' of San Francisco, of 4507 tons gross register, and 2279 tons net register," etc. * * * "Witnesseth: Whereas, by requisition order dated October 12, 1917, pursuant to the Urgent Deficiency Act, 15 June, 1917, and the President's Executive Order 11 July, 1917, United States has requisitioned the use of the steamship 'Beaver' and the steamship has been delivered into the possession of the United States pursuant to the requisition; and

Whereas, it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for the use of the steamship so requisi-

tioned, and to define by agreement the rights and duties of the United States, and of the owner with respect to the operation of the vessel under the requisition, and with respect to other matters in connection therewith;

Now, therefore, it is agreed as follows:

First. The terms and conditions under which the vessel is to be operated shall be those contained in the 'Time Form' hereto annexed."

Now, on the second page of the charter-party is the time form, and the part I desire to refer to recites as follows:

"Whereas, the United States has determined to deliver possession of the vessel to the owner, to be operated by the owner for the United States";

And again, paragraph second on the same page which reads:

"The owner shall operate the vessel for the United States, shall provide and pay for all provisions," etc.

Now, when these documents were signed, they were signed by Mr. Farrell, the President of the Steamship Company. As a matter [101] of fact, they were signed a few days before the 14th of January, and then sent back to Washington, and then they were—these two returned, and have been in the files of the company ever since. I am acquainted with Mr. Farrell's signature, and the name here, J. D. Farrell, is his signature.

Now, the operations continued under that charter-

party, these charter-parties, that is, Exhibits "C" and "D," until the 29th day of May, 1918, when The San Francisco and Portland Steamship Company received from the Shipping Board the following telegram, which I desire to offer in evidence, and have marked and substitute a copy for the original, and withdraw the original, the copy to have the same force and effect as evidence as the original would have.

(Telegram marked Defendant's Exhibit "E" and read as follows:)

Defendant's Exhibit "E."

"Washington, D. C., May 24, 1918.

San Francisco & Portland Steamship Company,
Pier 40, San Francisco, California.

Five days' notice is hereby given of the cancellation of requisition charter on steamships 'Beaver' and 'Rose City' and that on and after May 29th the Shipping Board will be under no responsibility whatever with respect to such vessels.

UNITED STATES SHIPPING BOARD."

Mr. COCHRAN.—This was received by our general manager, according to the notation in the evening, 6:25 P. M. May 24th. I call your attention to paragraph third, page 1 of the charter-party, of these exhibits "C" and "D," which reads as follows:

"Third: Upon giving five days' written notice to the owner United States may at any time when the

vessel is in a United States port cancel this requisition charter without prejudice to the approved rights of either party." [102]

Now, when Defendant's Exhibit "E," the telegram from United States Shipping Board cancelling the requisition charter was received, the San Francisco and Portland Steamship Company was a little bit up in the air whether they were under Federal control or whether the company itself would have to operate it. The matter was taken up with Mr. C. R. Gray, director of the division of operation of the United States Railroad Administration, and finally he constituted his organization for the purpose of operating the boat—operating the "Rose City." The steamer "Beaver" having been in the meantime commandeered by the United Navy. So Mr. Gray wrote a letter to Mr. Farrell, President of the Oregon-Washington Railroad & Navigation Company, the original of which is in our files, but which I would like to retain in the files, and substitute a copy, and the document which I have and will ask to be marked is such copy, and I personally know that to be a copy.

Mr. WILSON.—Objected to as irrelevant and immaterial.

COURT.—Admit it subject to your objection.

Mr. WILSON.—Save an exception.

(Marked Defendant's Exhibit "F.")

Defendant's Exhibit "F."

"July 12, 1918.

President.

UNITED STATES RAILROAD ADMINISTRATION.

W. G. McADOO, Director General.

Division of Operation,

C. R. GRAY, Director.

Interstate Commerce Building.

Washington.

At San Francisco, July 11, 1918.

Mr. J. D. Farrell,

President, Oregon-Washington Railroad & Navigation Company,

Portland, Oregon.

My dear Sir:

The operation of the ships and facilities of The San Francisco and Portland Steamship Company for the United States Railroad Administration will be placed under the jurisdiction of Mr. J. P. [103] O'Brien, General Manager, Oregon-Washington Railroad & Navigation Company.

Mr. G. L. Blair, as general manager of The San Francisco and Portland Steamship Company, will continue in charge of the same as general manager, reporting to Mr. O'Brien.

The Shipping Board have definitely decided that they will not charter the SS. Alvarado, but are favorably disposed towards chartering the SS. Blandon, and an effort is now being made by wire

to definitely charter this vessel for a two months' trial period on the bare boat basis, and if chartered, this boat will be turned over to Mr. Blair for freight operation between Portland and San Francisco.

Yours very truly,

(Signed) C. R. GRAY."

Mr. COCHRAN.—Now, the charter-parties, Defendant's Exhibits "C" and "D" make reference to the President's Executive Order of the 11th of July, 1917. I assume the Court will take judicial knowledge of that order, but for the purpose of refreshing the memory of the Court, it reads as follows:

"By virtue of authority vested in me in the section entitled 'Emergency Shipping Fund,' of an Act of Congress entitled 'An Act making Appropriation to supply Urgent Deficiencies in Appropriations for the Military and Naval Establishments on account of War Expenses for the Fiscal Year ending June 30 and for other purposes," approved June 15, 1917, I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said Act in so far as applicable to and in furtherance of the construction of vessels, the purchase or requisitioning of vessels in process of construction, whether on the ways or already launched, or of contracts for the construction of such vessels and the completion thereof, and all power and authority applicable [104] to and in furtherance of the production, purchase, and requisitioning of materials and ship construction.

And I do further direct that United States Shipping Board shall have and exercise all power and authority vested in me in said section of said Act, in so far as applicable to, and in furtherance of the taking over of title or possession, by purchase or requisition, of constructed vessels or parts thereof, or charters therein; and the operation, management and disposition of such vessels and of all other vessels heretofore or hereafter acquired by the United States. The powers herein delegated to the United States Shipping Board may, in the discretion of said Board, be exercised directly by the said Board, or by it through the United States Shipping Board Emergency Fleet Corporation, or through any other corporation organized by it for such purpose.

(Signed) WOODROW WILSON.

The White House, 11 July, 1917."

It is Government Document No. 2664.

Mr. WILSON.—The San Francisco and Portland Steamship Company never canceled its tariff for shipments between San Francisco and Portland.

Mr. COCHRAN.—Well, I don't know, I am sure, but my understanding is that everything went right on as before.

Mr. WILSON.—The "Rose City" and "Beaver" continued to operate between San Francisco and Portland during this entire period?

Mr. COCHRAN.—Yes; there was no cessation of the movement of the boats.

Mr. WILSON.—And they continued to handle

shipments tendered to the agent at San Francisco, the same as before that time.

Mr. COCHRAN.—Yes, they did just as the telegram, this Exhibit "B" said to do, namely, to operate their regular trades—operate in their regular trades, and the company did continue the operation [105] of their steamers. The only difference is, they did it for the account of the Government, and not for themselves.

Mr. WILSON.—And the company issued its own bills of lading?

Mr. COCHRAN.—Well, the form will show here. On these forms, now, it has been my observation throughout the Railroad Administration as well as the steamship operation, that the stationery, such as the forms of bills of lading, waybills, expense bills, and other forms in use in the handling of traffic, were used precisely the same after Government control as before Government control. But I don't consider that it made it a corporation contract because the Government used that form.

Defendant's Exhibits "C" and "D," being respectively charter-parties of the steamers "Rose City" and "Beaver" to United States Shipping Board, are hereto attached and made a part of this bill of exceptions.

Mr. COCHRAN.—I desire to request special findings in this case in favor of the defendant. I desire also a special finding if your Honor shall find for plaintiff in any amount, excluding all computation for damages in respect to all shipments which moved to Portland because it is not shown that on

the Portland shipments, either on the line or route outlined by the tariff, or by the line or route, or by any line geographically considered, that Portland is intermediate to North Portland. I urge this finding upon the grounds further, as stated in the demurrer to the complaint, and among which may be mentioned that this Court has no jurisdiction of the subject matter of this action. That jurisdiction is lodged solely in the Interstate Commerce Commission, and complaint in this case fails to state facts sufficient to constitute a cause of action. [106]

After argument of counsel, Mr. Wilson, as counsel for plaintiff, submitted to the Court a request for findings and judgment in favor of the plaintiff in the manner following:

"This matter having come on for trial before the Court without a jury, the parties by their respective attorneys having waived a jury by written stipulation, the plaintiff appearing by his attorney James G. Wilson, of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, his attorney, the evidence having been submitted by both parties, the Court being fully advised, does now make and find from the issue presented by the pleadings and the evidence offered the following

FINDINGS OF FACT.

I.

That from noon of December 28th, 1917, to midnight of February 29th, 1920, the United States Railroad Administration was in control of the line of steamboats and steamships between San Fran-

cisco, California, and Portland, Oregon, belonging to the San Francisco and Portland Steamship Company, and was operating the same as a common carrier in interstate commerce under the authority of the United States Director General of Railroads; that the defendant is the duly appointed, qualified and acting agent of the United States Railroad Administration and is authorized to represent it in the defense of this action.

That the Oregon-Washington Railroad & Navigation Company, pursuant to Section 5 of the Act of Congress known as the Act to Regulate Commerce as amended by the Act of Congress of August 24th, 1912, entitled "An Act to Provide for the Opening 1912, entitled "An Act to Provide for the Opening, Maintenance, Protection and Operation of the Panama Canal and the Sanitation and [107] Government of the Canal Zone," filed an application with the Interstate Commerce Commission as the owner of the stock of the San Francisco and Portland Steamship Company for permission to continue the ownership and control, and to continue the operation of the line of steamships and steamboats of the San Francisco and Portland Steamship Company between San Francisco and Portland after the 1st day of July, 1914, and that on said hearing the Interstate Commerce Commission found that the Oregon-Washington Railroad & Navigation Company was the owner of the stock of said San Francisco and Portland Steamship Company, and that said line was being operated in the interest of the public and was of advantage to the con-

venience and commerce of the people, and would neither exclude, prevent, nor reduce competition on the route by water between San Francisco and Portland, and granted permission that the said Oregon-Washington Railroad & Navigation Company might continue the operation of said line subsequent to July 1st, 1914; that said Interstate Commerce Commission in said order granting said permission also ordered the San Francisco and Portland Steamship Company to file with the Commission all of its tariffs, rules and regulations as required by the Act to Regulate Commerce, and thereafter said San Francisco and Portland Steamship Company did file its tariffs with reference to, among others, the transportation of sugar between San Francisco and Portland, and in conjunction with the Oregon-Washington Railroad & Navigation Company its rates on sugar between San Francisco and North Portland, Oregon; that in and by said opinion the Interstate Commerce Commission found that Astoria, Oregon, was the only intermediate point between San Francisco and Portland on the route of the San Francisco and Portland Steamship Company.

III.

That prior to taking control of said line of steamboats and steamships by the said United States Railroad Administration, said [108] San Francisco and Portland Steamship Company in conjunction with the Oregon-Washington Railroad & Navigation Company established and filed with the Interstate Commerce Commission a schedule of rates,

including a rate on sugar in carload lots of #30,000 minimum, from San Francisco to North Portland, and that the rate so established was continued in effect and adopted by the United States Railroad Administration during its operation of said line and the operation of the line of the Oregon-Washington Railroad & Navigation Company; that the rate on sugar in carload lots so published, filed and put in effect was twelve and one-half (12½¢) cents per hundred pounds at all times between noon of December 28th, 1917, and June 24th, 1918, inclusive; and was fifteen and one half (15½¢) cents per hundred pounds from and including the 25th day of June, 1918, to and inclusive of the 29th day of February, 1920; that the United States Railroad Administration carried from San Francisco to Portland, Oregon, all of the shipments of sugar listed in the exhibits attached to the complaint and to the stipulation amending the complaint shown as transported between San Francisco and Portland, and all of the shipments of sugar from San Francisco to Astoria, Oregon, on said exhibits listed as transported from San Francisco to Astoria, and on all of such shipments so carried from and including the 29th day of December, 1917, to and including the 24th day of June, 1918, charged and collected for its transportation charges at the rate of fifteen (15¢) cents per hundred pounds; and on all shipments so shown on said exhibits from and including the 25th day of June, 1918, to and inclusive of the 29th day of February, 1920, charged and collected the sum of nineteen (19¢) cents per hundred

pounds; and in addition to such charges collected and received on all such shipments war tax at the rate of 3% of the freight charged.

IV.

That all of said charges at said rates were paid by the [109] plaintiff's assignors to the United States Railroad Administration; that the amount of the excess charges so collected by the United States Railroad Administration from the plaintiff's assignors between the 29th day of December, 1917, to and inclusive of the 24th day of June, 1918, over and above what said shipments would have earned if charged at the rate in effect from San Francisco to North Portland was and is the sum of three thousand two hundred and 90/100 ($3,200.90) dollars; and the amount of such excess charges so collected by the United States Railroad Administration from and including the 25th day of June, 1918, to and including the 29th day of February, 1920, was and is in the sum of four thousand one hundred thirty-eight and 16/100 ($4,138.16) dollars.

V.

That Portland and Astoria, Oregon, are intermediate between San Francisco, California, and North Portland, Oregon, on the route established by the San Francisco and Portland Steamship Company in connection with the Oregon-Washington Railroad & Navigation Company, and continued in effect by the United States Railroad Administration for shipments of sugar between San Francisco and North Portland, and the United States Railroad Administration charged and collected on all of the

shipments to Portland and Astoria a greater sum than the rates established by it on shipments of sugar from San Francisco to North Portland, and that said shipments from San Francisco to Portland and Astoria moved over the same route in the same direction, and the haul from San Francisco to Portland and Astoria was included within the haul over the route so established from San Francisco to North Portland, said excess of charges so made being the amount shown in the preceding paragraph.

VI.

That on the 12th day of October, 1917, the United States Shipping Board notified the San Francisco and Portland Steamship [110] Company that it would at noon on October 15th, 1917, requisition all steamers of not less than twenty-five hundred tons total dead weight including bunkers, water, and stores, and all passenger steamers of not less than twenty-five hundred tons gross register, and also notified said San Francisco and Portland Steamship Company that "Owners whose steamers are operating in their regular trades are to continue the operation of their steamers for account of the Government as they have been doing for themselves until they receive further instruction," that thereafter formal charters were executed as of October 15th, 1917, covering the steamships "Beaver" and "Rose City," owned by the San Francisco and Portland Steamship Company, that on the 24th day of May, 1918, the United States Shipping Board notified the San Francisco and Portland Steamship Com-

pany as follows: "Five days' notice is hereby given of the cancellation of the requisition charter on the steamships 'Beaver' and 'Rose City,' and that on and after May 29th the Shipping Board will be under no responsibility whatsoever with respect to said vessels."

VII.

That the United States Railroad Administration during all of the time from December 29th, 1917, to February 29th, 1920, on all of the shipments shown in the exhibits attached to the complaint and to the stipulation amending the complaint, issued its bills of lading whereby it agreed to transport said sugar and collected from the plaintiff's assignors the charges for the transportation of said shipments, and did not cancel its tariffs on file with the Interstate Commerce Commission at any time during said period, but at all times accepted shipments under said tariff and collected charges thereon.

VIII.

That the shippers who shipped said sugar over the line of the San Francisco and Portland Steamship Company operated by the United States Railroad Administration as listed on the exhibits attached to plaintiff's complaint and to the stipulation amending [111] plaintiff's complaint have each and all assigned their claims for the collection of said overcharges by the United States Railroad Administration from the said shippers to the plaintiff herein, and he is the lawful owner and holder thereof; that the sum of fifteen hundred $1500.00) dollars is a reasonable sum to allow the plaintiff

as attorney's fees for the collection of said overcharges, said attorney's fee to cover only the work with reference to said collection in this court and not on any appeal therefrom.

From the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the charges collected from the plaintiff's assignors for the transportation of sugar in carload lots from San Francisco, California, to Portland and Astoria, Oregon, were illegal and in violation of the amended fourth section of the Act to Regulate Commerce to the extent that the same exceeded the rates established and in effect from San Francisco to North Portland, Oregon, over the line of the San Francisco and Portland Steamship Company and the Oregon-Washington Railroad & Navigation Company at the time of the movement of said respective shipments.

II.

That the United States Railroad Administration, having issued its bills of lading and collected the freigh charges on shipments between December 28th, 1917, and May 29th, 1918, was liable to the shippers on such contracts of carriage and collection of charges, notwithstanding the fact that the United States Shipping Board had requisitioned some of the vessels of the San Francisco and Portland Steamship Company. [112]

III.

That the defendant is liable to the plaintiff for

the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

IV.

That the plaintiff is entitled to judgment against the defendant for the sum of seven thousand, three hundred thirty-nine and 6/100 ($7,339.06) dollars together with interest at the rate of 6% per annum on the sum of three thousand two hundred and 90/100 ($3,200.90) dollars from the 25th day of June, 1918, and together with interest at the rate of 6% per annum on the sum of four thousand one hundred thirty-eight and 16/100 ($4,138.16) dollars from March 1st, 1920, and fifteen hundred ($1,500.00) dollars allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein.

THEREUPON Mr. Cochran, as attorney for defendant, submitted in writing to the Court the following objections to findings of fact and conclusions of law proposed and requested by the plaintiff.

Objections to Findings of Fact and Conclusions of Law.

"Comes now the defendant and objects and excepts to certain findings of fact and conclusions of law requested by the plaintiff in the manner following, that is to say:

I.

Defendant objects to Finding of Fact I in respect to the date from which the defendant began

operation of the steamships belonging to The San Francisco and Portland Steamship Company, for the [113] reason that the evidence discloses the defendant did not begin the operation of said boats until May 29th, 1918, and that in so far as said finding recites the defendant's operation to have been begun December 28th, 1917, the same for the period from that date to May 29th, 1918, is unsupported by the evidence.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

II.

Defendant objects to Finding of Fact II as proposed by plaintiff, alleging the same is immaterial to any issue in this case, and for further reason that the operations of The San Francisco and Portland Steamship Company and of the defendant in this case are not subject to the Act to Regulate Commerce, and are not made subject thereto by the Act of Congress of August 24th, 1912, entitled 'An Act to Provide for the Opening, Maintenance, Protection and Operation of the Panama Canal and the Sanitation and Government of the Canal Zone,' commonly known s the 'Panama Canal Act.'

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

III.

Defendant objects and excepts to Finding of Fact III, alleging the same to be immaterial to any proper or legal issue in this case.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

IV.

Defendant objects and excepts to Finding of Fact IV, and alleges same is immaterial and that plaintiff is not entitled to [114] recover said moneys or any part thereof, and defendant further objects and excepts to that part of the finding which recites the defendant to have collected any freight between the 29th day of December, 1917, and the 29th day of May, 1918, for the reason that defendant was not during that period in control of the boats of The San Francisco and Portland Steamship Company, but that said control during that period was under the United States Shipping Board's Emergency Fleet Corporation.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

V.

Defendant objects and excepts to Finding of Fact V as proposed by plaintiff, for the reason the same is not supported by the evidence, particularly with respect to that portion of the finding which recites Portland as intermediate between San Francisco, California, and North Portland, Oregon, and further that The San Francisco and Portland Steamship Company did not establish any route either of itself or in connection with Oregon-

Washington Railroad & Navigation Company between San Francisco and North Portland by which Portland was intermediate.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

VI.

Defendant objects and excepts to Finding of Fact VII, and alleges said finding of fact is unsupported by the evidence.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

VII.

Defendant objects and excepts to Finding of Fact VIII, and [115] particularly to that part allowing attorney's fees for the collection of said overcharges, and avers that since there were no overcharges no attorney's fees can properly be allowed.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

VIII.

Defendant objects and excepts to Conclusion of Law I to the effect that the charges collected from plaintiff's assignors were illegal and in violation of the amended fourth section of the Act to Regulate Commerce, and alleges a proper conclusion of law to be that defendant only collected charges on

sugar shipments in carload lots between the dates of May 29th, 1918, and February 29th, 1920, and only then at the proper, legal and valid tariff rates.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

IX.

Defendant objects to Conclusion of Law II, alleging same to be erroneous in all respects but particularly in respect to that period of time when the boats of The San Francisco and Portland Steamship Company were operated by The San Francisco and Portland Steamship Company as agent for the United States Shipping Board.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

X.

Defendant objects and excepts to Conclusion of Law III, alleging same to be erroneous.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was [116] duly allowed.

XI.

Defendant objects and excepts to Conclusion of Law IV, alleging same to be erroneous, and alleges further in support of said objection that the plaintiff is entitled to no judgment against defendant, and that his action should be dismissed.

The Court overruled said objection, to which

ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

XII.

Defendant objects generally to a judgment in favor of the plaintiff for any sum of money, and requests a judgment in favor of defendant for the reason that testimony properly supports such judgment.

The Court overruled said objection, to which ruling of the Court counsel for defendant excepted, and his exception was duly allowed.

The Court thereupon signed the Findings of Fact and Conclusions of Law requested by plaintiff, and ordered same filed as the decision of the Court in said cause, to which ruling of the Court counsel for defendant excepted and exception was duly allowed.

WHEREUPON a judgment was entered in favor of the plaintiff and against the defendant as follows:

"This matter coming on, on application of the plaintiff for the entry of judgment in the above-entitled cause, the plaintiff appearing by his attorney James G. Wilson of the firm of Wilson & Guthrie, and the defendant appearing by Charles E. Cochran, his [117] attorney, the Court having heretofore filed its findings of fact and conclusions of law, and being fully advised in the premises:

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiff, A. J. Parrington, have and recover of and from the defendant, James C.

Davis, Agent of the United States Railroad Administration, judgment in the sum of Seven Thousand Three Hundred Thirty-nine and 6/100 ($7,339.06) Dollars, together with interest at the rate of 6% per annum on the sum of Three Thousand Two Hundred and 90/100 ($3,200.90) Dollars from the 25th day of June, 1918, and together with interest at the rate of 6% per annum on the sum of Four Thousand One Hundred Thirty-eight and 16/100 ($4,138.16) Dollars from March 1st, 1920, and Fifteen Hundred ($1500.00) Dollars allowed as attorney's fees in this court, and the plaintiff's further costs and disbursements incurred herein, taxed and allowed at the sum of $18.61, and it is further adjudged and ordered that the defendant pay said sum promptly to the plaintiff as required by Section 206 of the Transportation Act of 1920.

Done and dated in open court this 5th day of August, 1921."

And now, because the foregoing matters and things are not of record in this case, I, Robert S. Bean, District Judge, and the Judge trying the above-entitled action in the District Court of the United States for the District of Oregon, do hereby certify that the foregoing bill of exceptions truly states the proceedings had before me on the trial of the above-entitled action, and contains all the evidence, both oral and written, introduced by either of said parties throughout said trial, together with

the rulings of the Court on the questions of law presented, and that the exceptions taken by the defendant therein were duly taken and allowed, and that said bill of [118] exceptions was duly prepared and submitted within the time allowed by the rules of this Court as extended by stipulation of the parties and the order of this Court duly made and entered in accordance with the provisions of such stipulation, and is now signed and settled as and for the bill of exceptions in the above-entitled action, and same is ordered made a part of the record in said action.

R. S. BEAN,
Judge.

Due and legal service of the within bill of exceptions prepared and certified to be such by Charles E. Cochran, one of the attorneys for the defendant, is hereby admitted at Portland, Oregon, this 17th day of September, 1921.

JAMES G. WILSON,
Attorney for Plaintiff.

Filed September 21, 1921. G. H. Marsh, Clerk.
[119]

AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court a petition for writ of error, in words and figures as follows, to wit: [120]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Defendant.

Petition for Writ of Error.

James C. Davis, Agent United States Railroad Administration, defendant in the above-entitled action, conceiving himself aggrieved by the final order and judgment of this Court made and entered against him and in favor of the plaintiff on the fifth day of August, 1921, and the findings of fact and conclusions of law in said cause made, and the objections severally taken thereto and the rulings of the Court thereon as set forth in his assignments of error filed herein, petitions said Court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith under and in accordance with the rules of the United

States Circuit Court of Appeals in the behalf made and provided;

And also that an order be made fixing the amount of security which the defendant shall give and furnish in said writ of error and that upon giving such security all further proceedings in the court be suspended and stayed until the dismissal of said writ of error by the said United States Circuit Court of Appeals, and relative thereto defendant respectfully shows:

That by reason of the premises defendant alleges manifest error has happened to the great damage [121] defendant herein.

The defendant has filed herewith his assignments of error upon which he relies and will urge in the said United States Circuit Court of Appeals.

WHEREFORE defendant prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this court for the correction of the errors so complained of and that a transcript of the record of proceedings, papers, and all things concerning same upon which said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that defendant recover judgment as demanded in his answer.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [122]

AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [123]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Defendant.

Assignments of Error.

Comes now the defendant above named, appearing by Arthur C. Spencer, John F. Reilly, and Charles E. Cochran, his attorneys of record, and says that the judgment and final order of this Court, made and entered in the above-entitled court on the 5th day of August, 1921, in favor of the plaintiff above named and against the defendant, is erroneous and against the just rights of the defendant, and files

herein, together with his petition for writ of error from said judgment and order, the following assignments of error which he avers occurred upon the trial of said cause:

I.

The Court erred in overruling and in not sustaining defendant's demurrer to the plaintiff's complaint.

II.

The Court erred in admitting in evidence over the objection and exception of defendant the opinion and order of the Interstate Commerce Commission on application of Oregon-Washington Railroad & Navigation Company under the provision of section 5 of the Acts to Regulate Commerce as amended by the Panama Canal Act, in connection with the ownership of the San Francisco and Portland Steamship Company, said opinion being reported in 34 I. C. C. 165.

III.

The Court erred in overruling defendant's objection to Findings of Fact No. I, and in not sustaining said objection for the reasons therein stated. [124]

IV.

The Court erred in overruling defendant's objection to Findings of Fact No. II, and in not sustaining same and erred in holding that the Director General of Railroads and this defendant as agent in the operation of the boats of the San Francisco and Portland Steamship Company between the ports of San Francisco, California, and Portland, Oregon, was and is subject to the Act to Regulate

Commerce, and is made subject thereto by the act of Congress of August 24, 1912, entitled "An Act to provide for the opening, maintenance, protection, and operation of the Panama Canal and the sanitation and Government of the Canal Zone," commonly known as "The Panama Canal Act."

V.

The Court erred in overruling defendant's objection to Findings of Fact No. III, and in not sustaining the same.

VI.

The Court erred in overruling defendant's objection to Findings of Fact No. IV, and in not sustaining the same, and particularly did the Court err in holding defendant to have collected freight charges between the 29th day of December, 1917, and the 29th day of May, 1918, because as defendant alleges said vessels were under the control of the United States Shipping Board's Emergency Fleet Corporation.

VII.

The Court erred in overruling and in not sustaining defendant's objection to Finding of Fact No. VII.

VIII.

The Court erred in overruling and in not sustaining defendant's objection to Findings of Fact No. VII. [125]

IX.

The Court erred in overruling and in not sustaining defendant's objection to Findings of Fact No. VIII.

X.

The Court erred in overruling defendant's objection to Conclusions of Law No. I, and erred in not concluding that defendant collected only the lawful, valid, and proper tariff rates on the sugar carried between the dates of May 29, 1918, and February 29, 1920.

XI.

The Court erred in overruling defendant's objection to Conclusions of Law No. II, particularly with respect to that period of time when the vessels of the San Francisco and Portland Steamship Company were operated by said company as agent for the United States Shipping Board.

XII.

The Court erred in overruling and in not sustaining defendant's objection to Conclusions of Law No. III.

XIII.

The Court erred in overuling and in not sustaining defendant's objection to Conclusions of Law No. IV, and in entering judgment in favor of the plaintiff against defendant, which judgment should have been in favor of defendant that plaintiff's action be dismissed.

XIV.

The Court erred in overruling defendant's objection to a judgment in favor of plaintiff for any sum of money and in not granting defendant's request for judgment in favor of defendant for the reason that the testimony properly supports such judgment. [126]

XV.

The Court erred in overruling defendant's request for special findings in this case in favor of the defendant and in not giving judgment in favor of the defendant for the dismissal of plaintiff's complaint.

XVI.

The Court erred in holding and in finding that the charges collected by defendant from the plaintiff's assignors for the transportion of sugar in carload lots from San Francisco, California, to Portland, and Astoria, Oregon, were illegal and in violation of the amended fourth section of the Act to Regulate Commerce, to the extent that same exceeded rates established and in effect from San Francisco, California, to North Portland, Oregon, over the line of the San Francisco and Portland Steamship Company and the Oregon-Washington Railroad and Navigation Company at the time of the movement of the respective shipments, and in not concluding as a matter of law as requested by defendant that such charges were lawfully assessed and collected pursuant to valid tariffs.

XVII.

The Court erred in entering judgment in favor of plaintiff against defendant for the sum of seven thousand three hundred and thirty-nine 6/100 dollars ($7,339.06), with interest at the rate of six per cent per annum on three thousand two hundred and 90/100 dollars ($3,200.90) thereof from the 25th day of June, 1918, and upon four thousand one hundred and thirty-eight and 16/100 dollars ($4,138.16) from March 1, 1920, and also the sum of fifteen hundred

dollars (1500.00) as attorney's fees, and likewise erred in refusing and declining to enter judgment in favor of defendant.

WHEREFORE the said defendant and plaintiff in error prays that said judgment of the District Court be reversed, [127] with directions to District Court to enter a judgment in favor of the defendant.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27th, A. D. 1921.

JAMES G. WILSON,
Attorney for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [128]

AND AFTERWARDS, to wit, on the 27th day of September, 1921, there was filed in said court a praecipe for transcript, in words and figures as follows, to wit: [129]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES G. DAVIS, Agent, United States Railroad Administration,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the writ of error to be perfected herein and include in said transcript the following proceedings, papers, records, and files, to wit:

1. The plaintiff's complaint with amendments and supplemental demands.
2. Defendant's demurrer.
3. Answer.
4. Reply.
5. Bill of exceptions and certificate omitting exhibits attached thereto.
6. Judgment.
7. Petition for writ of error.
8. Assignments of error.
9. Order allowing writ of error and fixing bond.
10. Supersedeas bond and bond for costs.
11. Writ of error.
12. Citation on writ of error. [130]
13. Stipulation as to printing record.
14. This praecipe and any and all records, entries, orders, papers, proceedings, and files necessary or proper to make a complete record from said writ of error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the

United States Circuit Court of Appeals for the Ninth Circuit.

ARTHUR C. SPENCER,
JOHN F. REILLY,
CHARLES E. COCHRAN,
Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 27, 1921. G. H. Marsh, Clerk. [131]

AND AFTERWARDS, to wit, on Wednesday, the 28th day of September, 1921, the same being the 75th judicial day of the regular July term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [132]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Defendant.

Order Allowing Writ of Error.

This 28th day of September, 1921, came the defendant above named, James C. Davis, Agent, United States Railroad Administration, appearing by Arthur C. Spencer, John F. Reilly and Charles E. Cochran, his attorneys, and filed herein and presented to the court his petition praying for an allowance of a writ of error from the decision and judgment of this Court, made and entered on the 5th day of August, 1921, in favor of the plaintiff above named and against said defendant and the findings of fact and conclusions of law made or refused on the trial of the above-entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit to this court, together with certain assignments of error intended to be urged by him within due time.

And also praying that a transcript of the record and proceedings and papers upon which said judgment herein was entered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error and that upon the giving of such security all further proceedings of this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, in consideration thereof, this Court does allow said writ of error upon said defendant filing with [133] the clerk of this court a good and sufficient bond in the sum of $10,000.00, to the effect that if said defendant, James C. Davis, Agent, United States Railroad Administration, shall prosecute the said writ of error to effect and answer all damages and costs if defendant fails to make his plea good, then said bond to be void; otherwise to remain in full force and virtue, the said bond to be approved by the Court, and it is ordered that all proceedings in this court be and the same are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that said bond shall operate as a supersedeas bond.

Dated this 28th day of September, 1921.

R. S. BEAN,
Judge.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 28, 1921. G. H. Marsh, Clerk. [134]

AND AFTERWARDS, to wit, on the 28th day of September, 1921, there was duly filed in said court, a bond on writ of error, in words and figures as follows, to wit: [135]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that James C. Davis, Agent, United States Railroad Administration, principal, and National Surety Company of New York, a corporation, surety, are hereby and firmly bound unto A. J. Parrington, the above-named plaintiff in the sum of $10,000.00, to be paid to the said A. J. Parrington, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our successors and assigns firmly by these presents.

Sealed with our seals and dated the 27th day of September, 1921.

WHEREAS, the above-named James C. Davis is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Oregon, entered on the 5th day of August, 1921:

Now, the condition of this obligation is such that if the above-named James C. Davis, as agent, defendant, shall prosecute said writ of error to effect and answer all costs and damages, if he shall fail to make good this plea, then this obligation to be void; otherwise to be and remain in full force and effect.

JAMES C. DAVIS,
Agent, United States Railroad Administration.
By C. E. COCHRAN,
One of His Attorneys.

THE NATIONAL SURETY COMPANY OF NEW YORK.
By E. P. WELCH,
Resident Vice-President.

[Seal] Attest: D. E. GORTON,
Resident Assistant Secretary. [135½]

Countersigned at Portland, Oregon, this 27th day of September, 1921.

E. P. WELCH,
Resident Agent.

Examined and approved this 28th day of September, 1921.

R. S. BEAN,
District Judge.

Service by copy admitted at Portland, Oregon, September 27, 1921.

JAMES G. WILSON,
Solicitor for Plaintiff.

Filed September 28, 1921. G. H. Marsh, Clerk. [136]

AND AFTERWARDS, to wit, on the 3d day of October, 1921, there was duly filed in said court a stipulation as to transcript of record, in words and figures as follows, to wit: [137]

In the District Court of the United States for the District of Oregon.

L.—8747.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Stipulation as to Transcript of Record.

It is stipulated and agreed by and between counsel for the respective parties to this cause that in preparing a certified copy of the record, the clerk of this court may omit the preparation of copies of the original exhibits physically attached to the bill of exceptions and except such exhibits from the effect of his certificate.

Dated at Portland, Oregon, this 27th day of September, 1921.

C. E. COCHRAN,
Of Attorneys for Plaintiff in Error.
WILSON & GUTHRIE,
Attorneys for Defendant in Error.

Filed October 3, 1921. G. H. Marsh, Clerk. [138]

AND AFTERWARDS, to wit, on the 28th day of October, 1921, there was duly filed in said court a stipulation relative to exhibits, in words and figures as follows, to wit: [139]

In the District Court of the United States for the District of Oregon.

L.—8747.

A. J. PARRINGTON,

Plaintiff,

vs.

JAMES C. DAVIS, Agent, United States Railroad Administration.

Stipulation Re Original Exhibits.

WHEREAS, Defendant's Exhibit "C" and "D" in the above-entitled action consist of a Requisition Charter respectively of the Steamers "Beaver" and "Rose City" owned by the San Francisco & Portland Steamship Company, but the subject of charter to the United States Shipping Board; and

WHEREAS, said exhibits are in words and figures the same except Exhibit "C" is for the Steamer "Beaver" and Exhibit "D" is for the Steamer "Rose City"; and

WHEREAS, the above-entitled action was consolidated for trial with the action of A. J. Parrington vs. The San Francisco & Portland Steamship Company, which case also is being taken to the United States Circuit Court of Appeals for the Ninth Circuit:

NOW, THEREFORE, it is stipulated and agreed by and between counsel for the respective parties that Defendant's Exhibit "C" may be attached to and made a part of the bill of exceptions and that same may serve also as defendant's Exhibit "D" as well, so that Exhibit "D" may be attached to the bill of exceptions in the case of A. J. Parrington vs. The San Francisco & Portland Steamship Company.

Dated at Portland, Oregon, this 26th day of October, 1921.

JAMES G. WILSON,
Attorney for Plaintiff.
C. E. COCHRAN,
Attorney for Defendant.

Filed October 28, 1921. G. H. Marsh, Clerk. [140]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages numbered from 3 to 140, inclusive, constitute the transcript of record upon writ of error in the cause in said court in which A. J. Parrington is plaintiff and defendant in error and James C. Davis, Agent,

United States Railroad Administration, is defendant and plaintiff in error; that said transcript has been prepared by me in accordance with the praecipe filed by said plaintiff in error and is a full, true, and complete transcript of the record and proceedings had in said court in said cause designated by the said praecipe to be included therein, as the same appear of record and on file at my office and in my custody.

I further certify that I return to the United States Circuit Court of Appeals for the Ninth Circuit with the said transcript of record annexed thereto the original writ of error and the original citation filed in said cause.

I further certify that the cost of the foregoing transcript of record is $49.35 and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 7th day of October, 1921.

[Seal] G. H. MARSH,
Clerk. [141]

[Endorsed]: No. 3799. United States Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Agent, United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Transcript of Record. Upon

Writ of Error to the United States District Court of the District of Oregon.

Filed November 12, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the District of Oregon.

L.—8747.

October 25, 1921.

A. J. PARRINGTON,

Plaintiff,

vs.

JOHN BARTON PAYNE, Agent United States Railroad Administration (San Francisco & Portland Steamship Company),

Defendant.

Order Enlarging Time to and Including November 15, 1921, to File Record and Docket Cause.

Now, at this day, for good cause shown, it is ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to November 15, 1921.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: No. 3799. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including Nov. 15, 1921, to File Record and Docket Cause. Filed Oct. 28, 1921. F. D. Monckton, Clerk. Refiled Nov. 12, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Stipulation Re Omission of Exhibits Attached to Complaint.

It is stipulated and agreed by and between counsel for the respective parties that in printing the record of the above-entitled action the Clerk of the Circuit Court of Appeals may omit the following documents constituting exhibits attached to the complaint:

"A" on page 18 of the transcript.
"B" on page 19 of the transcript.
"C" on pages 20 and 21 of the transcript.
"D" on pages 22 and 23 of the transcript.
"E" on page 24 of the transcript.

"F" on page 25 of the transcript.
"G" on page 26 of the transcript.
"H" on page 27 of the transcript.
"I" on page 28 of the transcript.
"J" on page 29 of the transcript.
"K" on page 30 of the transcript.
"L" on page 31 of the transcript.
"M" on page 32 of the transcript.
"N" on page 33 of the transcript.
"O," "P" and "Q" on page 34 of the transcript.

—and also the following for supplemental exhibits:

Supplementary Exhibit "R" (Allen & Lewis) on page 50 of the transcript.

Supplementary Exhibit "S" (Allen & Lewis) on page 51 of the transcript.

—and in lieu thereof print this stipulation instead:

Said exhibits present among other things the following typical claims:

(A) Freight Bill No. 21; Way Bill Date 1-2-1918; No. 33; Consignor California & Hawaiian Sugar Refining Co.; Ship "Beaver," Voyage 185; Weight 30,740; Rate 15¢ Freight including War Tax $47.9; Date paid 1-8-1918; Overcharge claimed $7.91.

The amount of the claims of which (A) is typical is $7,339.06. Of the claims of which (A) is typical there are a substantial number arising from shipments originating during the period between January 1, 1918, and May 29, 1918, the amount of which may be determined by computation based upon the aforesaid exhibits.

Dated at Portland, Oregon, this 9th day of November, 1921.

C. E. COCHRAN,
Of Attorneys for Plaintiff in Error.
JAMES G. WILSON,
Of Attorneys for Defendant in Error.

Service by copy admitted at Portland, Ore., ——, 1921.

————————————,
Attorney for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Agent, United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Stipulation. Filed November, 1921. ————————, Clerk.

No. 3799. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 12, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed December 13, 1921. F. D. Monckton, Clerk.

No. 3799

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. L–8723.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, a Corporation,

Defendant in Error.

Stipulation for Consolidation of Causes for Trial.

IT IS STIPULATED AND AGREED between counsel for the respective parties to the above causes

of action now pending in the United States Circuit Court of Appeals for the Ninth Circuit that the Court may make an order to the following effect:

First: That the above-entitled three causes of action may be consolidated for trial in the above-entitled court, and that briefs of counsel in respect to each of said cases may be accordingly consolidated and the three cases heard together.

Second: That the transcript of record in the case of James C. Davis, Director General, Plaintiff in Error, vs. The Portland Seed Company, Defendant in Error, docketed and filed in this court, be not printed, but said case may be heard and disposed of according to law without such printing and upon the questions presented by the transcripts of record in cases 3799 and 3800, and the parties shall have the right in their brief to state the facts in connection with case No. L–8723, James C. Davis, Agent, Plaintiff in Error, vs. The Portland Seed Company, Defendant in Error, and the decision of said case shall not follow the order in the other two cases above mentioned in the event that the latter two cases shall be decided on some point other than that involved in said case No. L–8723.

Dated at Portland, Oregon, this 9th day of January, 1922.

C. E. COCHRAN,
Of Counsel for Plaintiffs in Error.
JAMES G. WILSON,
Counsel for Defendant in Error.

Dated: San Francisco, California, January 11, 1922.

So ordered:

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: Stipulation for Consolidation of Causes for Trial. Filed Jan. 11, 1922. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fifth day of June, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN JUDGMENTS AND DECREES.

By direction of the Honorable Erskine M. Ross, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and

that a judgment or decree be filed and recorded in the minutes of this court in each of the said causes in accordance with the opinion filed therein: * * * No. 3799. James C. Davis, etc., Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3800. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3828. James C. Davis, etc., Plaintiff in Error, vs. The Portland Seed Company, a Corporation, Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent,
Plaintiff in Error,
vs.
THE PORTLAND SEED COMPANY,
Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Upon Writs of Error to the District Court of the United States for the District of Oregon.

Before ROSS, MORROW and HUNT, Circuit Judges.

On writs of error to review judgments in favor of shippers for recovery of excess charges by carriers.

PARRINGTON'S CASES.

HUNT, Circuit Judge:

These cases involve rates on sugar from San Francisco, California, to Portland, Oregon. The San Francisco and Portland Steamship Company, called the Steamship Company, operates a line of steamers between San Francisco and Portland, via Pacific Ocean, Columbia and Willamette rivers, with a regular landing place at Ainsworth dock in Portland where connection is had with the Oregon-Washington Railroad & Navigation Company, called the Railroad Company, extending from Portland to North Portland. From December 28, 1917, to February 29, 1920, the Director General exercised control of the steamships. On February 17, 1916,

the Steamship Company, in connection with the Railroad Company, put into effect a tariff on sugar in carload lots of a minimum of 30,000 pounds of 12½¢ per cwt. The rate was applicable via the line of the Steamship Company to Portland, thence via the Railroad Company to North Portland, and was in effect until June 25, 1918. On June 25, 1918, the rate to North Portland was raised to 15½¢ per cwt., and continued in effect until August 26, 1920. From August 26, 1920, the rate from San Francisco to North Portland was 19½¢ per cwt. During the several periods mentioned the rate as per Steamship Company's tariff from San Francisco to Portland and Astoria, from December 28, 1917, to June 25, 1918 was 15¢ per cwt.; from June 25, 1918, to February 29, 1920, 19¢ per cwt.

Thus the situation became one where before June 24, 1918, the local rate from San Francisco to Portland was higher than the joint rate to North Portland, and after June 24, 1918, the local rate from San Francisco was higher to Portland than the joint rate to North Portland. Astoria carried the same rate as Portland.

The contention of Parrington is that the route from San Francisco to Portland is shorter than the route from San Francisco to North Portland, and that the route from San Francisco to Astoria is shorter than the route from San Francisco to North Portland. The Railroad Company admits the latter claim, but does not concede that the distance from San Francisco to Portland is shorter than from San Francisco to North Portland.

THE SEED COMPANY CASE.

The Seed Company claims that during December, 1918, and January, 1919, at Roswell, New Mexico, one Mitchell delivered to the Director General of Railroads two carloads of alfalfa seed consigned to the shipper's order, one car for Yakima, Washington, the other to Walla Walla, Washington, moving over the lines of the Atchison, Topeka & Santa Fe Railway to Denver, thence via Union Pacific lines to Granger, Wyoming, thence via Oregon Short Line to Huntington, Oregon, thence by Oregon-Washington Railroad and Navigation lines to Yakima and Walla Walla, Washington. The Director General delivered the cars to the Portland Seed Company upon surrender of the bill of lading endorsed, and thereafter demanded $1311.75 for the car going to Yakima, and $715.79 for the car moving to Walla Walla.

The published rate on alfalfa seed in carload lots from Roswell, New Mexico, to Yakima and Walla Walla, Washington, was $2.44 per cwt., that rate being a combination of local rates based upon Denver. The through rate from Pecos, Texas, to Yakima and Walla Walla was $1.51½ per cwt. The excess of the Roswell rate over the Pecos rate would produce, for the respective cars, certain sums which, with fees and costs, the Seed Company sued for.

The contention is that Pecos, Texas, being a point more distant than Roswell, New Mexico, on the same line or route over which shipments moved, any sum collected in excess of the Pecos rate was in

violation of section 4, the long and short haul clause of the Interstate Commerce Act.

In Parrington's cases it is argued that the Steamship Company could, without violating section 4 of the act, establish its local rate by water to Portland, and could also concur in a new independent route established by the joint tariffs of the railroad whereby the route from San Francisco to North Portland was created, and that while the Steamship Company used part of the lines of the Railroad Company, it was lawful to make a local rate via water line higher than the joint rate via the rail and water line. The accuracy of this reasoning depends upon whether the case is to be considered in recognition of the well established rule that by the amendments to section 4 of the Interstate Commerce Act, providing that the carrier has no right to charge more for a shorter haul over the same line or route than it charges for a longer haul, the shorter being included within the longer distance, the carrier cannot make such charge for the shorter haul until after it shall have presented the matter to the Interstate Commerce Commission and obtained from that body an order permitting the greater charge to the shorter point. Prior to the amendments of 1910, in the first instance, the carrier could under section 4 determine whether or not there was a dissimilarity of circumstances and conditions which authorized it to charge more for a shorter than for a longer haul over the same line. Since the Act of June 18, 1910, the right of the carrier in the first instance was taken away, leaving

the prohibition of the long and short haul clause absolute until the Interstate Commerce Commission could hear the matter, and if it might see fit, make an order consenting to the higher rate to the intermediate point. In the Intermountain Rate Cases, 234 U. S. 476, 482, the Court, speaking through the Chief Justice, after discussing the state of the law prior to and after the amendments, said: "It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to charge less for longer than for shorter distances for the transportation of persons or property' and gives the Commission authority from time to time 'to prescribe the extent to which such designated common carrier may be relieved from the operation of this section.'" (United States vs. Louisville & Nashville R. Co., 235 U. S. 314; Skinner & Eddy vs. United States, 249 U. S. 566.) Inasmuch as no permission from the Interstate Commerce Commission was obtained by the carriers concerned in the present cases, the greater charge to the shorter point was prohibited by the statute referred to. It was an illegal rate, unless the effect of failing to obtain the consent of the Commission can be avoided by regarding the question as purely administrative, to be submitted first to the Interstate Commerce Commission before appeal lies to the judicial power. The later decisions of the Supreme Court (Penn.

R. R. Co. vs. International Coal M. Co., 230 U. S. 184; Penn. R. R. Co. vs. Periton Coal Co., 237 U. S. 121; Penn. R. R. Co. vs. Sonman Coal Co., 242 U. S. 120), however, point out the distinction between an assault against the rule of the statute and an unequal and discriminatory application of the rule. Recently, in St. Louis I. M. & S. R. Co. vs. Hasty & Sons, 255 U. S. 252, where it was contended that a proper interpretation of railroad tariff called for administrative consideration, the Court said that the matter was so free from doubt that it was unnecessary to apply to the Commission for construction. The present case fairly illustrates the principle, for the question here involved is clearly not administrative as to what rate is reasonable, but whether under the circumstances already outlined, the only way provided for charging more for a short than for a long haul has been followed. If it has not there is a remedy by action in damages in court. (Sec. 9, Interstate Commerce Act.)

Counsel have argued that in the carriage from San Francisco to North Portland the line to North Portland is distinct from that to Portland, and they cite C. & N. W. Ry. vs. Osborne, 52 Fed. 912, as authority for their view that the local rate via water line or route could be higher than the joint rate via rail and water line or route. In the case cited the Court was considering the fourth section of the Act to Regulate Commerce when it was unlawful for the carrier to charge greater compensation for transportation of property under substantially similar circumstances and conditions for a shorter than for

a longer distance over the same line in the same direction, the shorter being included within the longer distance. Judge Brewer emphasized the use of the word "line" in the fourth section as it then read, and held that where two companies owning connecting lines of road unite in a joint tariff, they form for the connective rates, a new and independent line, and that neither is bound to adjust its own legal tariff to suit the other, nor is it compelled to make a joint tariff with it. But, when Congress amended the Act in 1910, and saw fit to add after the words "over the same line" the additional words "or route," it called for a new, and we believe, a broader interpretation by which the word "route" is not to be regarded as wholly synonymous with the word "line." We believe that something more was meant and that the effect was to require broader construction by regarding the words as pertaining to instances where carriers join their lines and then make a route; and that freight which is carried over the same route may be carried over a single line or a joint line. (R. R. Commission of Wisconsin vs. C. B. & Q. R., —— U. S. ——, Feb. 27, 1922.) We have here too the circumstance that the Oregon-Washington Railroad & Navigation Company controlled and operated the San Francisco and Portland Steamship Company.

In a brief filed by counsel as *amicus curiae* it is urged that by section 206 of the Transportation Act of 1920 (U. S. Stat. 1920, p. 461), jurisdiction of claims against the Railroad Administration for violations of the Act to Regulate Commerce is taken

from the courts and vested solely in the Interstate Commerce Commission. We cannot so hold. There is no language in the Transportation Act which indicates to us that Congress intended to make such a departure from the practice which had theretofore prevailed, and we believe that the contrary intent is to be gathered from the provision of section 206 (a) which provides that actions at law, suits in equity, and proceedings in admiralty "of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose." There is also a further provision that such action may be brought "in any court which, but for federal control, would have had jurisdiction of the cause of action, had it arisen against such carrier." We find no ground for saying that the Transportation Act has changed the jurisdiction of any cause of action with respect to the subject matter, and inasmuch as the cases under examination could have been brought in court against the carrier if the lines had been under private control when the shipments were made, the causes of action can be maintained against the agent designated by the President, to recover where the shipments moved during the time the federal government was in control.

A further contention is that the increase in rates made by what is generally known as General Order 28, the order of the Interstate Commerce Commission which permitted the increases to go into effect and which permitted carriers to violate the

long and short haul clause in so far as necessary to permit the increase to go into effect, operated to make valid all violations of the long and short haul clause irrespective of whether or not the violation was caused by an increase in rate or had existed prior to such order and without authority of the Commission permitting the same. Counsel as *amicus curiae* has urged this question but the plaintiffs in error did not raise it and it does not appear to have been considered by the lower court. It is, therefore, not for decision. In Robinson vs. B. & O. R. Co., 222 U. S. 511, the Supreme Court declined to take notice of a decision of the Interstate Commerce Commission which was not mentioned in the pleading or in the agreed statement of facts. It may well be doubted, however, whether under the Federal Control Act (40 Stat. 451, sec. 10) Congress authorized the Railroad Administration to disregard the long and short haul clause without first applying to the Interstate Commerce Commission and obtaining the contemplated order relieving it. It is true that in certain instances by General Order No. 28, as to increases in rates, violations of the long and short haul clause were authorized. The effect was that where there had been a violation of section 4 before General Order No. 28 was in force, the increase of rates increased the extent of the violation, but the order did not legalize a violation by a carrier which had previously violated the section.

It is said that the steamers could unload sugar at the municipal pier, which is below the Ainsworth

dock in Portland, and at such lower point transfer to the railroad company. But the rates to North Portland via Portland were established before any landing place other than Ainsworth dock was contemplated. Moreover, the tariffs of the Steamship Company provided that cargoes would not be taken or discharged other than at its regular landing place, which is Ainsworth dock in Portland, except at the option of the company.

Plaintiffs in error plead the statute of limitations as to certain of the claims. The Commerce Act, section 16, provides that all claims for the recovery of damages shall be filed within two years after the cause of action has accrued and not after. Prior to the amendment of 1920 section 16 required all complaints for the recovery of damages to be filed within two years from the time the cause of action accrued and not after, and that a petition for the enforcement of an order for the payment of damages should be filed in the circuit court or state court within one year from the date of the order, and not after. The language of the statute puts the limitation period upon proceedings before the Commission, and not upon proceedings in court on the orders of the Commission. Phillips vs. Grand Trunk & Western R. Co., 236 U. S. 664, cited by the plaintiffs in error, was an action instituted in court but it belonged to the class of cases which had to be instituted primarily before the Commission. Such a proceeding was instituted by one of the plaintiffs before the Commission, and the rate therein involved had been held to be unreasonable. Then, after the Com-

mission rendered its decision, Phillips commenced a direct proceeding in court based upon the finding of the Commission in the other proceeding. The Court treated the inquiry and the finding of the Commission as general in its operation, and held that the proceedings inured to the benefit of persons having similar claims to those presented by the other persons, and that such others, after the decision of the Commission, could sue directly in court and that all persons who were required to go before the Commission primarily were affected by the statute of limitations as applied to the originator of the proceeding before the Commission. We do not understand the decision as holding that the statute limits the proceedings before courts for the recovery of damages for violation of the Interstate Commerce Act. It is of significance that in the Act of 1920 there is no language of limitation against the shipper in recovering damages in the courts for violation of the act, and we regard it as fairly inferable that the statute of limitations remained as it was before 1920. This leaves the period of limitation to be determined by the statute of the state, in this instance the law of Oregon (sec. 6, Laws of Ore., 1920), which fixes the period of limitation for the recovery of a liability created by statute, other than a penalty or forfeiture, at six years. (C. & N. W. R. Co. vs. Ziebarth, 245 Fed. 336; Morrisdale Coal Co. vs. Penn. R. Co., 230 U. S. 304.)

Another point advanced by the plaintiffs in error is that the difference between the rate to North

Portland and to Portland was improperly used as a measure of damages. The question is like that presented to this Court in California Adjustment Company vs. Southern Pacific Company, 237 Fed. 954, where it was held that the rule adopted by the District Court is the correct one.

In its essential respects the case of the Seed Company is covered by what we have said of the Parrington cases, where the rates appear to have been made in violation of the long and short haul clause. (United States vs. Louisville & Nashville R. Co., 235 U. S. 314, 320.)

The judgments of the District Court are affirmed, and in addition to the amounts allowed by that court as attorneys' fees, fees for conducting the cases in this court are also allowed. (Mills vs. Lehigh Valley, 226 Fed. 812; N. Y., N. H. & Hartford vs. Ballou & Wright, 242 Fed. 862.) A reasonable fee in case #3799 in this court is $600; in case #3800, $1000; and in case #3828, $100.

With these additions, the judgments are affirmed.

[Endorsed]: Opinion. Filed Jun. 5, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Thursday, the ninth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Present: Honorable ERSKINE M. ROSS, Circuit Judge, Presiding; Honorable WILLIAM W. MORROW, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

No. 3800.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

3828.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

PORTLAND SEED COMPANY, a Corporation,

Defendant in Error.

Order of Submission.

ORDERED leave granted Mr. Ben C. Dey, to appear as *amicus curiae;*

FURTHER ORDERED above-entitled cause argued by Mr. Charles E. Cochran, counsel for the plaintiff in error in each of the above-entitled causes, and by Mr. Ben C. Dey, as *amicus curiae,* and by Mr. James G. Wilson, counsel for the defendant in error in each of the above-entitled causes, and submitted to the Court for consideration and decision, with leave to Mr. Dey to file a brief as *amicus curiae* within fifteen (15) days from date, and with leave to counsel for the defendant in error to reply thereto ten (10) days thereafter.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error.

vs.

A. J. PARRINGTON,

Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Oregon and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error, and that an attorneys' fee in the sum of $600.00 for services in the said Circuit Court of Appeals be, and hereby is allowed to counsel for the defendant in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered June 5, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Order Staying Issuance of Mandate, etc.

Upon application of Mr. C. E. Cochran, counsel for the plaintiff in error, and good cause therefor appearing, ORDERED mandate of this court in the above-entitled cause stayed to and including August 31, 1922, for the purpose of enabling said counsel to perfect a writ of error from the Supreme Court of the United States to the above-entitled court.

Dated: San Francisco, California, June 17, 1922.

WM. H. HUNT,
United States Circuit Judge.

[Endorsed]: Order Staying Issuance of Mandate, etc. Filed June 17, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Petition for Writ of Error.

Your petitioner, James C. Davis, Agent, United States Railroad Administration, plaintiff in error in the above-entitled action, respectfully shows:

That said action is now pending in the United States Circuit Court of Appeals for the Ninth Circuit, and that judgment has been therein rendered on the 5th day of June, 1922, affirming the judgment of the District Court of the United States, for the District of Oregon.

The matter in said action exceeds One Thousand Dollars, besides costs, and the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the action or controversy, being aliens or citizens of the United States, or citizens of the different states; this action does not arise under the patent laws, nor the revenue laws, nor the criminal laws, nor is it an admiralty cause, but is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

This petitioner therefore respectfully prays that a writ of error be allowed it in the above-entitled action, directing the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, to send the record and proceedings in said action, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of error herewith filed by said plaintiff in error, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

JAMES C. DAVIS,
Agent, United States Railroad Administration,
Plaintiff in Error,
By ARTHUR C. SPENCER,
C. E. COCHRAN,
Its Attorneys.

The foregoing petition is granted and writ of error allowed as prayed for upon the plaintiff in error giving bond according to law, in the sum of Ten Thousand ($10,000.00) Dollars.

W. H. HUNT,
U. S. Circuit Judge.

Service by copy admitted at Portland, Oregon, July 31, 1922.

WILSON & GUTHRIE,
Attorneys for Deft. in Error.

[Endorsed]: Petition for Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Assignment of Errors.

Now comes the plaintiff in error by Arthur C. Spencer and Charles E. Cochran, his attorneys, and says:

That in the record and proceedings aforesaid of said United States Circuit Court of Appeals, for the Ninth District, in the above-entitled cause and in the rendition of the final judgment therein manifest error has intervened to the prejudice of the plaintiff in error, in this, to wit:

I.

Said Circuit Court of Appeals erred in entering a judgment affirming the judgment of the District Court of the United States for the District of Oregon for Seven Thousand Three Hundred Thirty-nine and Six One-hundredths ($7339.06) Dollars with interest as in said judgment stated, and the further sum of Fifteen Hundred ($1500.00) Dollars as attorney's fees in the District Court, and the further sum of Six Hundred ($600.00) Dollars at-

torney's fees for services in said Circuit Court of Appeals, together with costs of suit entered on the fifth day of June, 1922 in favor of said defendant in error and against said plaintiff in error.

II.

Said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court as aforesaid and in not remanding said cause to said District Court with instructions to enter judgment in favor of the plaintiff in error and against the defendant in error dismissing said suit.

III.

Said Circuit Court of Appeals erred in holding that plaintiff in error was shown by the record in this cause to have violated the fourth section of the Act to Regulate Commerce.

IV.

Said Circuit Court of Appeals erred in not sustaining the following assignments of error appearing upon the record in said cause, to wit:

(a) Assignment of Error Number One charging error in overruling and not sustaining defendant's (plaintiff in error) demurrer to the plaintiff's (defendant in error) complaint.

(b) Assignment of Error Number Ten charging error in overruling and not sustaining objection and exception to conclusion of law Number One, and error in failing to conclude that plaintiff in error collected only the legal, proper and valid tariff rates.

(c) Assignment of Error Number Twelve where-

in error was charged in the overruling of objection to conclusion of law Number Three, wherein the lower court held the plaintiff in error liable for the excess charges over and above the charges which would have been assessed at the rate in effect between San Francisco and North Portland at the time said respective shipments moved.

(d) Assignment of Error Number Thirteen wherein error was charged in entering judgment in favor of the defendant in error and against the plaintiff in error and in not dismissing the complaint.

V.

Said Circuit Court of Appeals erred in holding the District Court of the United States for the District of Oregon had jurisdiction of said cause, and in not holding the Interstate Commerce Commission to have exclusive jurisdiction under Section 206C of the Transportation Act of 1920.

VI.

Said Circuit Court of Appeals erred in allowing judgment for attorney's fees as part of the costs in the Circuit Court of Appeals, and also in not reversing and disallowing the recovery of attorney's fees as part of the costs in the District Court.

VII.

Said Circuit Court of Appeals erred in holding the difference between the rate to North Portland and to Portland as the proper measure of damage or recovery.

VIII.

Said Circuit Court of Appeals erred in affirming the judgment of the court below because:

(a) There was no proof that the assignors of the defendant in error suffered damage as a result of the acts complained of, and

(b) There was no proof that plaintiff in error charged any shipper to North Portland less than the sum it charged the assignors of plaintiff in error for the transportation of said sugar.

IX.

Said Circuit Court of Appeals erred in holding the special findings of fact by the District Court were sufficient to sustain the judgment rendered against the plaintiff in error.

WHEREFORE, the said James C. Davis, Agent, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above-entitled cause to the prejudice of the plaintiff in error, the said judgment of the said United States District Court for the District of Oregon as affirmed by the judgment of the United States Circuit Court of Appeals be reversed, annulled and esteemed for naught, and that said cause be remanded to the United States District Court for the District of Oregon with instructions to grant a new trial in said cause, and upon such trial to dismiss the complaint, and for such further proceedings in said cause as may be determined upon by our Supreme

Court to the end that justice may be done in the premises.

ARTHUR C. SPENCER,
C. E. COCHRAN,
Attorneys for Plaintiff in Error.

Service by copy admitted at Portland, Oregon, July 31, 1922.

WILSON & GUTHRIE,
Attorneys for Defendant in Error.

[Endorsed]: Assignment of Errors on Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY,
Plaintiff in Error,

vs.

A. J. PARRINGTON,
Defendant in Error.

Order Allowing Writ of Error and Fixing Amount of Bond.

Based upon the petition of the plaintiff in error, together with certain assignments of error intended to be urged by it within due time, it is

ORDERED that a writ of error issue upon said plaintiff in error filing a bond with the Clerk of

this Court in the sum of Fifteen Thousand ($15,000.00) Dollars, said bond to operate as a supersedeas.

IT IS FURTHER ORDERED that the bond presented by the said petitioner be, and the same is hereby approved.

WM. H. HUNT,
Circuit Judge.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, James C. Davis, Agent United States Railroad Administration, as principal, and National Surety Company, as surety, are held and firmly bound unto A. J. Parrington, in the full and just sum of Ten Thousand ($10,000.00) Dollars to be paid to the said A. J. Parrington, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 20 day of July, 1922.

Whereas, lately at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, in an action depending in said court, between James C. Davis, Agent United States Railroad Administration, plaintiff in error, and A. J. Parrington, defendant in error, a judgment was rendered against the said James C. Davis, Agent, United States Railroad Administration, and the said James C. Davis, Agent United States Railroad Administration having obtained a writ of error and filed a copy thereof in the clerk's office of said United States Circuit Court of Appeals, to reverse the judgment in the aforesaid action, and a citation directed to the said A. J. Parrington citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 2d day of October, 1922.

Now, the condition of the above obligation is such, that if the said James C. Davis, Agent United States Railroad Administration shall prosecute said writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

JAMES C. DAVIS,
Agent United States Railroad Administration.
By C. E. COCHRAN,
One of His Attorneys.

[Seal] NATIONAL SURETY COMPANY OF NEW YORK,
By H. C. LEIGH,
Attorney in Fact.

Countersigned at Portland, Oregon, this 21st day of July, 1922.

D. E. GORTON,
Resident Agent.

Examined and approved this 2d day of August, 1922.

WM. H. HUNT,
U. S. Circuit Judge.

Service by copy admitted at Portland, Oregon, this 31st day of July, 1922.

WILSON & GUTHRIE,
Attorneys for Defendant in Error.

Form and amount approved.

WILSON & GUTHRIE.

[Endorsed]: Bond on Writ of Error Returnable in Supreme Court U. S. Filed August 2, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and sixty-four (164) pages, numbered from and including 1 to and including 164, to be a full, true and correct copy of the record under Rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the assignment of errors on writ of error from the Supreme Court of the United States, and of all proceedings had, and of all papers, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, made pursuant to request of counsel for the plaintiff in error, as the originals thereof remain on file

and appear of record in my office, as well as the following original exhibits:

Plaintiff's Exhibits Nos. 3, 4 (2 exhibits), 5 (2 exhibits, and 7;

Defendant's Exhibits Nos. "A" and 5,

and that the same constitutes the transcript of record upon writ of error from the Supreme Court of the United States in the above-entitled cause.

ATTEST my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 29th day of August, A. D. 1922.

[Seal] F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

In the Supreme Court of the United States.

JAMES C. DAVIS, Agent, United States Railroad Administration,

Plaintiff in Error,

vs.

A. J. PARRINGTON,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States to the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between James C. Davis, Agent United States Railroad Administration, plaintiff in error, and A. J. Parrington, defendant in error, a manifest error hath happened, to the great damage of the plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court

at Washington within sixty days from the date hereof; that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 18th day of August, 1922.

[Seal] F. D. MONCKTON,
Clerk of the Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy.

Allowed by:

WM. H. HUNT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Return to Writ of Error.

The answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, California, this 29th day of August, A. D. 1922,

THE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT,

[Seal] By F. D. MONCKTON,
Clerk.
By Paul P. O'Brien,
Deputy Clerk.

[Endorsed]: No. 3799. United States Circuit Court of Appeals for the Ninth Circuit. James C. Davis, Agent, U. S. Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Writ of Error. Filed Aug. 18, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the Supreme Court of the United States.

JAMES C. DAVIS, Agent, United States Railroad Administration,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Citation on Writ of Error.

The United States of America,—ss.

The President of the United States to A. J. Parrington, Defendant in Error, GREETING:

You are hereby cited and admonished to be and

appear before the Supreme Court of the United States to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein James C. Davis, Agent United States Railroad Administration, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. HUNT, Judge of the Circuit Court of Appeals for the Ninth Circuit, this 18th day of August, in the year of our Lord, one thousand nine hundred and twenty-two.

WM. H. HUNT,
Judge, United States Circuit Court of Appeals for the Ninth Circuit.

Copy of writ served on us this 21st day of August, 1922.

JAMES G. WILSON,
Of Attorneys for Defendant in Error.

Service by copy admitted at Portland, Or., August 21st, 1922.

JAMES G. WILSON,
Attorney for Defendant in Error.

[Endorsed]: No. 3799. In the Supreme Court of the United States. James C. Davis, Agent United States Railroad Administration, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. Citation on Writ of Error. Filed Aug. 23, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy.

Office Supreme Court, U. S.
FILED
MAR 17 1924
WM. R. STANSBURY
CLERK

No. 123.

In the Supreme Court of the United States.

JAMES C. DAVIS, AGENT, UNITED STATES RAILROAD ADMINISTRATION, PLAINTIFF IN ERROR,

v.

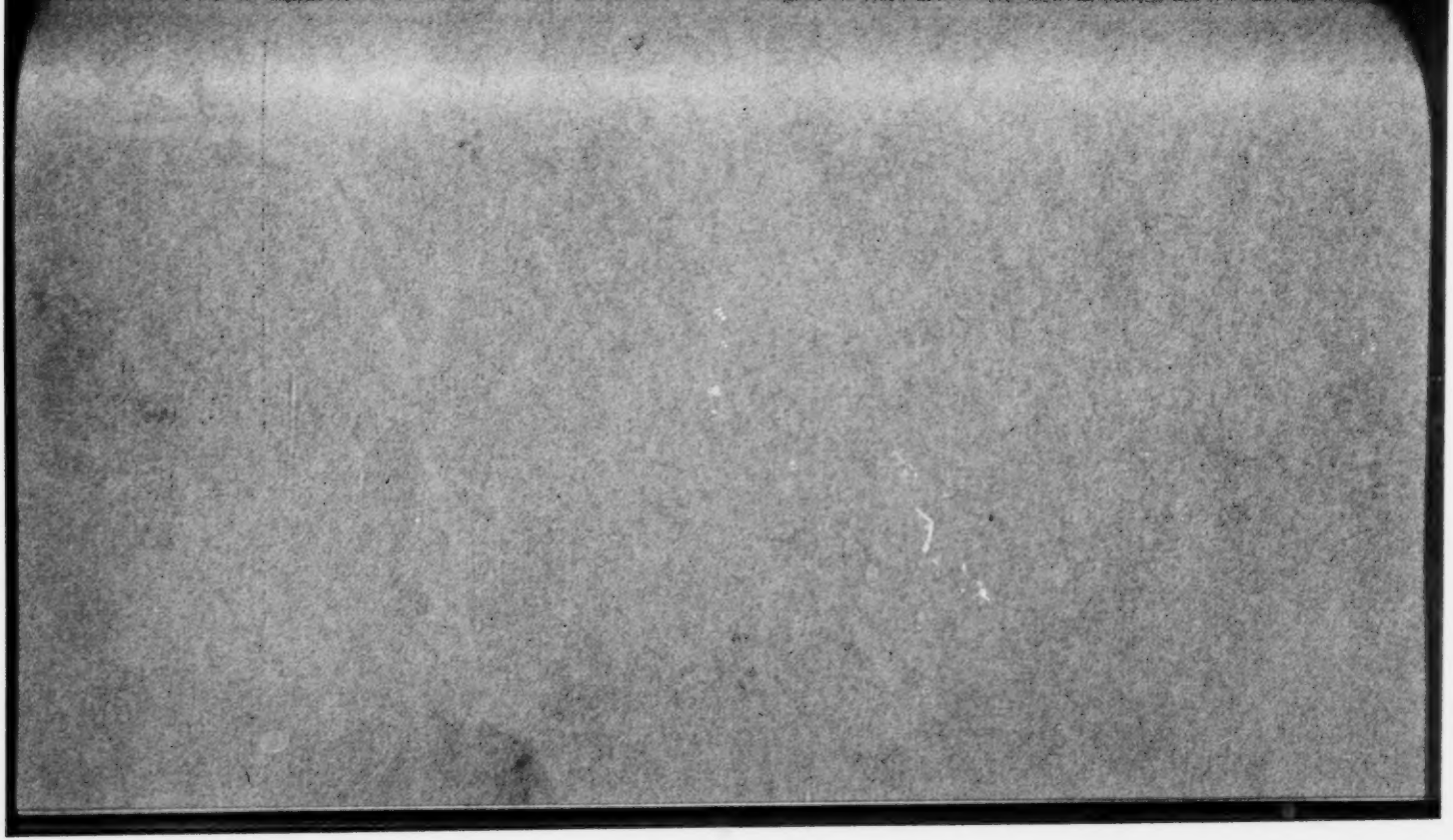
A. J. PARRINGTON, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR FOR "AN ORDER TO RECONSIDER THE RULE ANNOUNCED IN KANSAS CITY SOUTHERN v. WOLF, 43 S. C. R. 259, WITH REFERENCE TO THE LIMITATION OF ACTIONS IN VIEW OF SUBSEQUENT LEGISLATION OF CONGRESS AND TO RECEIVE AND CONSIDER THE ACCOMPANYING ARGUMENT ON SAID RECONSIDERATION."

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Plaintiff in Error.

WASHINGTON, D. C., *March 17, 1924.*

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924



In the Supreme Court of the United States.

JAMES C. DAVIS, AGENT, UNITED STATES Railroad Administration, plaintiff in error,

v.

A. J. PARRINGTON, DEFENDANT IN ERROR.

No. 123.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION OF DEFENDANT IN ERROR FOR "AN ORDER TO RECONSIDER THE RULE ANNOUNCED IN KANSAS CITY SOUTHERN v. WOLF, 43 S. C. R. 259, WITH REFERENCE TO THE LIMITATION OF ACTIONS IN VIEW OF SUBSEQUENT LEGISLATION OF CONGRESS AND TO RECEIVE AND CONSIDER THE ACCOMPANYING ARGUMENT ON SAID RECONSIDERATION."

The plaintiff in error understands that the motion of the Defendant in error is not for reconsideration of the *Wolf case*, 261 U. S. 133, itself, but is limited to a motion for reconsideration of the validity of the rule of limitation of actions announced in that case in view of subsequent legislation. For convenience the plaintiff in error will hereinafter be referred to as the Director General.[1]

[1] The actual plaintiff in error is the Agent of the President, designated by the President as required by the provisions of Section 206 (a) of the Transportation Act of 1920, as the Agent against whom suit may be brought under the provisions of that section. The President, however, designated as such Agent, the Director General of Railroads, who, nevertheless, is not subject to suit as such, but only as Agent of the President.

On this understanding and, moreover, in view of this court's refusal to reconsider its decision in the *Wolf case*, the Director General will not, at this time, argue the question of the validity of that decision. It will be assumed that the decision is controlling here unless subsequent legislation has since invalidated it.

The defendant in error, as shown by its motion and argument in support thereof, urges that the Wolf decision has been invalidated by Section 206 (*a*) and Section 206 (*c*) of the Transportation Act of 1920, and by the amendment of Section 16 of the Interstate Commerce Act by the Transportation Act. The sections referred to are printed in the argument of the defendant in error, but for convenience are likewise appended to this brief.

So far as the amendment to Section 16 of the Interstate Commerce Act is concerned, it will suffice to say that the applicability of that amendment to the Director General is before this court in the case of *E. I. Dupont de Nemours & Company* v. *James C. Davis, Director General*, No. 517, October Term, 1923, and will doubtless be argued and disposed of before the motion of the defendant in error herein can be considered.

So far as Section 206 (*a*) is concerned, the whole argument of the defendant in error that that section extends the time for bringing actions in court against the Agent of the President, in any event, for the period of two years after the passage of the Trans-

portation Act, depends on the unwarranted assumption stated on page 8 of its brief that—

> there is no Federal or statutory period of limitation prescribed for the commencement of actions in court under Sections 8 and 9 of the Act to Regulate Commerce.

This assumption is in direct conflict with the construction placed by this court upon those sections in the Act to Regulate Commerce in the Wolf case, that is, that that Act requires suit to be brought within two years after the accrual of the cause of action.

This being so, the construction placed upon Section 206 (*a*) by this court itself in the case of *Leigh Ellis & Company* v. *Davis, Agent*, 43 Supreme Court Reporter 243, is conclusive against the contention of the defendant in error that that section extended the time for bringing suit beyond the period of action prescribed by the Interstate Commerce Act as construed by the decision of this court in the *Wolf case*, that is, within two years after the cause of action accrued. In the *Leigh Ellis case* this court said:

> The contention is supported with some ingenuity, but we think it enough to observe that *the general purpose was to limit, not to extend, rights of action*, and that we can not suppose that it was extended to invalidate existing contracts good when made.

In other words, since the Act to Regulate Commerce as prescribed in the Wolf case did prescribe a limitation of two years from the accrual of the cause of action for the bringing of action against a carrier

under that Act, that limitation applies to actions against the Presidential Agent under the decision of this court in the Leigh Ellis case, since as this court said in that case:

> The general purpose of Section 206 (*a*) was to limit, not to extend, rights of action.

It follows that taking the decision in the *Wolf case* in connection with the decision in the *Leigh Ellis case*, that this suit was not brought as provided by Section 206 (*a*)—

> within the periods of limitation now prescribed by State or Federal statutes

except as to such shipments as moved within two years prior to February 12, 1921.

So far as Section 206 (*c*) is concerned, the defendant in error is in the paradoxical position of contending for the right to maintain this suit in court under the provisions of Section 206 (*a*) without preliminary complaint to the Interstate Commerce Commission, while at the same time claiming the benefit of the period of limitation allowed by Section 206 (*c*) solely for the filing of complaints with the Interstate Commerce Commission.

The Director General concedes that Section 206 (*c*), unlike Section 206 (*a*), does not limit but extends the period of limitation previously provided by the Act to Regulate Commerce, but this extension is confined to the filing of complaints with the Interstate Commerce Commission. Moreover, the Director General has contended, in his brief previously

filed herein, that Section 206 (*a*) does not apply to a claim for damages against the Presidential Agent for violation of the Fourth Section, or of any section of the Interstate Commerce Act, so as to permit a suit to be filed originally in court, but that such a claim being for the collection of a rate "otherwise in violation of the Interstate Commerce Act," must under the specific provisions of Section 206 (*c*) be filed with the Interstate Commerce Commission. It is true that on argument, Counsel for the Director General conceded that suits for violation of the Fourth Section could be brought in court without preliminary complaint to the Interstate Commerce Commission. Because of lack of time, however, Counsel did not argue the further question whether such suits could be so brought against the Presidential Agent, nor would such an argument have been strictly germane since it was the Director General's principal and ultimate contention that the Fourth Section could have no application whatever to him.

It does not, therefore, seem appropriate for the Director General, in connection with this discussion purely of the question of limitations of actions, to discuss further the question whether any action at all will lie against him under Section 206 (*a*) for a violation of the Fourth Section, or whether as against him, as distinguished from a carrier, the remedy for such a violation is ~~co~~nclusively by complaint to the Interstate Commerce Commission under Section 206 (*c*). It will suffice to say in this re[illegible]pect that if Section 206

(*c*) does apply, the defendant in error is out of court, and if it does not, the limitation period provided by it is irrelevant to this suit under Section 206 (*a*).

It is obvious, therefore, that the validity of the *Wolf case* has not been affected, so far as the Director General or the Presidential Agent is concerned, by any subsequent legislation, and particularly by anything in Section 206 (*a*) or Section 206 (*c*) of the Transportation Act, or the amendment to Section 16 of the Interstate Commerce Act.

On the other hand, if this court should desire to reconsider the validity of the decision in the *Wolf case*, itself, irrespective of subsequent legislation, the Director General would, of course, desire an opportunity to present his views in this connection.

Respectfully submitted.

JOHN F. FINERTY,
Assistant General Counsel,
United States Railroad Administration,
Attorney for Plaintiff in Error.

WASHINGTON, D. C., *March 17, 1923.*

APPENDIX.

TRANSPORTATION ACT, 1920.

SECTION 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier.

SECTION 206. (c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection of enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be

filed with the Commission, within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a).

AMENDMENT TO SECTION 206 (A) AND SECTION 206 (C), FEBRUARY 24, 1922.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subdivision (a) of section 206 of the Transportation Act, 1920, be, and the same hereby is, amended by striking out the period at the end thereof, substituting a semicolon, and adding the following: "except that actions to enforce awards made by the commission under the provisions of subdivision (c) against the agent so designated by the President may be brought within one year after the date of the commission's award."

SECTION 2. That subdivision (c) of said section 206 be, and the same hereby is, amended to read as follows:

"(c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of

rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign, or intrastate traffic), which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year, or, if so claimed in respect of overcharges above the legal tariff charge, within two years and six months, after the termination of Federal control, against the agent designated by the President, under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under the Federal control at the time the matter complained of took place. The commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon by the agent designated by the President under subdivision (a)."

Section 16 (3) Interstate Commerce Act as Amended by Transportation Act, 1920.

(3) All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier, after the expiration of such two years or within ninety days before such expiration, begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the district court or State court within one year from the date of the order, and not after.

○

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WM. R. STANSBU
CLERK

No. 128

In the Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Agent of the President and Director General of Railroads,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF IN ANSWER TO SUPPLEMENTAL BRIEF OF DIRECTOR GENERAL

JAMES G. WILSON,
508 Platt Building,
Portland, Oregon,
Attorney for Defendant in Error.

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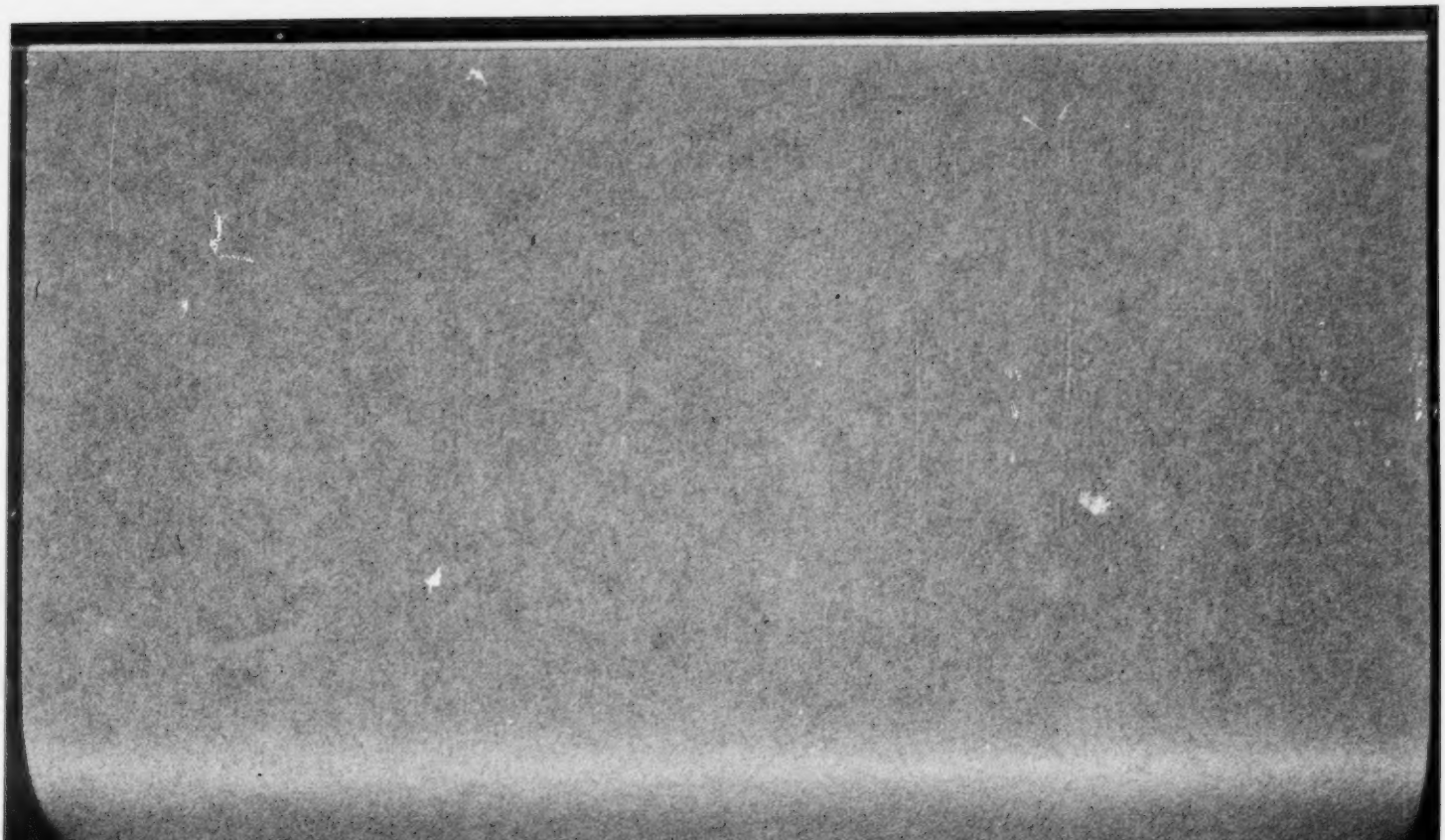

No. 123

In the Supreme Court of the United States

OCTOBER TERM, 1923

JAMES C. DAVIS, Agent of the President and Director General of Railroads,
Plaintiff in Error,
vs.
A. J. PARRINGTON,
Defendant in Error.

Upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF IN ANSWER TO SUPPLEMENTAL BRIEF OF DIRECTOR GENERAL

The Railroad Administration's assistant general counsel on behalf of plaintiff in error has filed a supplemental brief herein of 82 pages, discussing in great detail generally his ideas of the construction of the long and short haul clause of the 4th Section of the Act, and maintaining that no violation of the Act has been shown because there was no proof of shipments between the more distant points to which the lesser rate applied, and also maintaining that the Director General was not sub-

ject to the 4th Section of the Act to Regulate Commerce.

We will not attempt to discuss every particular angle of the attorney's discussion, as we will attempt to point out that the subjects which he discusses are in fact determined by the interpretation which this Court has already placed upon the 4th Section. It will be noted that the greater portion of counsel's supplemental brief is devoted to an attempt to secure an interpretation of the 4th Section to the effect that the mere publication of a lesser rate to the more distant point does not constitute a violation of the Interstate Commerce law, and that the higher rate to the intermediate point when published in the tariffs remains the only lawfully published rate to the intermediate point and must be charged notwithstanding the law says that no such charge shall be made and that no violation of the long and short clause of the 4th Section can exist until it is actually proven that shipments have been made to the more distant point at the lesser rate. It should also be noted that counsel's argument concedes that for any carrier other than the Director General when a shipment has in fact been shown to have been made to the more distant point it has violated the long and short haul clause and renders itself immediately liable to damages and to the criminal penalty, and that the measure of the damages is the difference in the rate charged to the intermediate point and the lesser rate charged to the more distant point, the latter concession being

diametrically opposed to the contention of counsel in the Director General's opening brief.

This interpretation of the long and short haul clause is diametrically opposed to the interpretation of the 4th Section by this Court in United States vs. Louisville & Nashville Railroad Co., 235 U. S. 314, pointed out and referred to in our former brief. To our mind, the decision in that case answers every phase of the discussion of the 4th Section contained in the supplemental brief, and the contention of the assistant general counsel of the Railroad Administration can only be sustained on the basis of the incorrectness of that decision. The 4th Section made it absolutely unlawful to charge or receive any greater compensation in the aggregate for the transportation of property for a shorter than for the longer distance over the same line or route in the same direction, the shorter being included within the longer distance. The first proviso provided that upon application to the Interstate Commerce Commission such common carrier may in special cases after investigation be authorized by the Commission to charge less than for the shorter distances. The second provisio reads: "Provided further that no rates or charges lawfully existing at the time of the passage of this amendatory act *shall be required to be changed* by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission in accordance with the provisions of this

Section until a determination of such application by the Commission." In the Louisville & Nashville case this Court interprets the prohibition of the section in connection with the provision as to no rates being required to be changed within six months, as absolutely prohibiting the existence of such rates after the expiration of that time, if at that time no application had been filed with the Commission to continue the same.

The language of this Court, speaking through the late Chief Justice White (235 U. S. Page 323), is: * * * "And for the purpose of making the prohibition efficacious, it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted" * * * The proviso that no changes were required to be made in the *rates or charges* lawfully existing until a certain time and on a certain contingency, taken in connection with the absolute prohibition of the section against that character of charges can certainly only be interpreted as absolutely prohibiting the existence of any such rates after the expiration of the time where no application had been made to continue them, and to require a change in any theretofore lawfully existing rate or charge of that character. Under the interpretation contended for by counsel in the supplemental brief there would have been no requirement on the part of the carrier to have changed a single rate, and such rates could have gone on forever, or until such time as someone had shipped to the

further point, but pending the shipment to the further point the higher rate to the intermediate point would be lawful and the carrier could have continued to charge the higher rate to the intermediate point without any penalty, either criminal or civil, until someone had made a shipment to the further point at the lesser rate. The taking effect of the prohibition certainly did not depend upon any such contingency. The carriers of the country certainly did not place any such interpretation upon the section, for they all, within the time limit, rearranged their schedule of rates to comply, or filed applications with the Commission for the right to continue.

Under counsel's contention, if a carrier should apply to the Commission for permission to charge less to the more distant point than to the intermediate point, and the Commission should deny the application, the carrier could go on charging the higher rate to the intermediate point without any penalty or without violating the section until there had been a shipment to the more distant point.

To our mind this contention is absurd. To illustrate, after the denial of the application by the Commission, the carrier could continue its rates on a higher basis to the intermediate point and if a shipment to the intermediate higher rate point is made, say on January 1st, there would be no violation of the Act and consequently no recovery. On January 3rd a shipment occurs to the more distant point at the lesser rate. There is still no violation of the Act as to the shipment on

January 1st, because at the time it was made there had been no shipment to the further point. On January 5th, however, another shipment is made to the intermediate point at the higher rate, but this is illegal because on January 3rd there had been a shipment to the further point at a less rate, and this notwithstanding there had been an order prior to any of the shipments denying to the carrier the right to charge more to the intermediate point.

It seems to us that no such possible interpretation of the Act can be made.

The higher charge to the intermediate point in the present case was made first on May 10th, 1916. Prior to that date the rates to both Portland and North Portland were the same, to-wit, 12½ cents (Tr. Pp. 58 and 60), so that subsequent to the expiration of six months from June 18, 1910, the date of the amendment of the 4th Section, the rates to Portland and North Portland were on the same basis. On May 10, 1916, however, the rate to Portland, the intermediate point, was raised to 15 cents without any change in the rate to North Portland, and without any application to or authorization by the Interstate Commerce Commission.

The prohibition of the 4th Section must necessarily apply to the establishment of the rate or charges in order to give effect to the various parts of the Act, for the carriers are required to establish and put their rates and

further point, but pending the shipment to the further point the higher rate to the intermediate point would be lawful and the carrier could have continued to charge the higher rate to the intermediate point without any penalty, either criminal or civil, until someone had made a shipment to the further point at the lesser rate. The taking effect of the prohibition certainly did not depend upon any such contingency. The carriers of the country certainly did not place any such interpretation upon the section, for they all, within the time limit, rearranged their schedule of rates to comply, or filed applications with the Commission for the right to continue.

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The prohibition of the 4th Section must necessarily apply to the establishment of the rate or charges in order to give effect to the various parts of the Act, for the carriers are required to establish and put their rates and

charges into effect by filing and publication for a period of thirty days before such charges become effective. The public is bound to take notice of such filing and publication and any rates or charges established cannot be changed except by special permission without thirty days publication of such change. The higher charge to an intermediate point cannot be made without previous authority of the Commission after investigation, and the authorization of such higher charge must necessarily have preceded the filing of the tariffs.

The only reasonable interpretation therefore which can be placed upon the amendment of the 4th Section is that which has in fact been placed thereon by this Court, to-wit, that after the date named where no application was filed, the higher rate to the intermediate point ceased to exist. The assistant general counsel for the Railroad Administration realized that this Court's interpretation of this section was absolutely fatal to his contention. He cannot distiguish the case and he therefore flatly contradicts it and italicizes the contradiction thus: "With all due deference to the late Chief Justice, it *was not* 'enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted'. *It was merely enacted* that such rates *should be unlawful* for the future unless authorized by the Commission upon application" * * * (Page 22 of Assistant General Counsel's Supplemental Brief). He further tries to depreciate the effect of that decision

by saying (page 23): "Indeed not the least remarkable aspect of what has come to be known as the Nashville Case, is the fact that no one has since been able to determine just how the late Chief Justice worked out a fourth section violation in that case" * * * This Court, speaking through the late Chief Justice was very particular to answer that very question on Page 323 of 235 U. S., in language beginning thus: * * * "To determine whether Section 4 is applicable requires a very brief consideration of the uncontroverted situation from which the rebilling privilege arose and upon the existence of which it depended" * * * and very specifically points out the nature and effect of the rebilling privileges and wherein the rates there in question were a violation of the long and short haul cause. The Court was very particular also to refer to the fact (Page 325) that in the argument the matter had been put up as a question of preference or discrimination under Sections 2 and 3 of the Act, and not an inquiry under Section 4, but the Court said that notwithstanding this fact and disregarding immaterial considerations of form and looking to the substance of things, that it was a violation under Section 4, and again on Page 326 the Court says: "And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined *by the substance of things, and not by names*, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose." Coun-

sel further attempts to depreciate the effect of this decision by saying (Page 23 of Counsel's Supplemental Brief), that when the case went back to the Commission it was disposed of by the Commission considering it as a case under Section 3 and not under Section 4, and cites Duncan vs. N. C. & St. L. Ry. Co., 35, I. C. C. 477.

We have examined this opinion of the Commission and are at a loss to understand counsel's statement, for the opinion distinctly states that the case was back before the Commission not only as a preference under Section 3, but upon applications of the carriers under Section 4, and the Commission states in its opinion that no facts had been adduced by the carriers under their application under Section 4, which would warrant the Commission in granting relief under that Section. The Commission also refers to the fact that additional applications had been made by the carriers involved in the Nashville Case with reference to the same and additional points and that upon a hearing upon such additional applications the matter would be further considered, but the opinion leaves no doubt that upon the showing upon the applications before the Commission in connection with the remand of the case that the 4th Section had been considered, and the decision was the denial of relief under Section 4 as well as under Section 3. Further reference is made by counsel in the supplemental brief that the Director General does not apprehend that this Court will seek to extend to the determination of the question of what was the legally applicable rate for the

past, the language used by this Court with reference to the Commission's power for the future, "and which was, even in that connection of questionable accuracy." The language of this Court in the Nashville Case applies, we submit, to the interpretation of the 4th Section in all cases irrespective of whether it is specific as to rates for the future or rates in the past which have violated the Act. The language of the interpretation is that after a date fixed by the statute, certain character of rates cease to exist, to-wit, those charging a higher rate for the intermediate haul than for the more distant haul where no application has been made and granted.

The language is neither "of questionable accuracy" nor does it apply more to rates that are to be charged in the future than to those that have been charged. It applies to all charges of the prohibited class.

We submit that the record in this case shows that the rates in question were attempted to be initiated after the expiration of six months after the amendment of the 4th Section of 1910, and that no application had been made to the Commission and no order granting permission to establish or charge any such rate to the intermediate point. Such rate had no force ad initio, and anyone who had been compelled to pay any higher rate than was established to the more distant point had his remedy by collection of the amount charged over that which the law said could be charged. It could make no difference under the interpretation placed on the statute

in the Nashville Case whether the particular controversy referred to rates contemplated for the future or those which had been charged in the past. After the decision in the Nashville Case any shipper between the points in the Nashville Case who had been charged the higher rate than this Court said was lawful could recover the amount by which he had been charged illegally.

The interpretation of the 4th Section as contained in the Nashville Case automatically disposes of counsel's contention that there was no violation of the Act until a shipment had been made and proven to the more distant point, for the higher intermediate rate never went into effect.

The only contention of counsel which is not disposed of by this decision is the contention that the Director General is not subject to the provisions of the 4th Section.

DIRECTOR GENERAL WAS SUBJECT TO THE FOURTH SECTION

It is argued in the supplemental brief that the Director General was not subject to the provisions of the Fourth Section. Section 10 of the Federal Control Act provides "That carriers while under federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal law or at common law, except insofar as may be inconsistent with the

provisions of the Act or any other Act appplicable to federal control, or with any order of the President. Actions at law or suits in equity may be brought by it against such carriers and judgment rendered as now provided by law; and in any action at law or suit in equity against the carrier no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government" * * *

The argument of counsel that the Director General is not subject to the 4th Section is based entirely upon the ground that the Director General was an agency of the Government. The provisions of the 4th Section were not inconsistent with the powers conferred upon the President, and in fact the Director General considered himself subject to that Section. He applied in all cases where he desired to depart from the 4th Section to the Commission for relief from that section, and while 4th Section Order No. 7361 was not and is not in the record in this case, it is quoted on page 84 of the supplemental brief and it appears from the second paragraph of the recitals that the Director General had applied for relief from the long and short haul clause in so far as it was necessary to permit the rates increased by General Order 28 to go into effect. The Interstate Commerce Commission considered the Director General subject to the 4th Section, as shown by its opinion in Johnson vs. A. T. S. F. Ry. Co. (51 I. C. C. 356), noted by counsel in his supplemental brief at page 78, in which the Commission directly held that the application of the

4th Section did not interfere with the unified co-ordinated national control or in anywise hinder the prosecution of the war. This decision was rendered early in the period of Federal control, to-wit, November 11th, 1918. Criticism of this decision is made by counsel, because it is contended that the Director General was not a party to the case, which counsel characterizes as "extraordinary". However in a case decided approximately at the same time, November 15th, 1918, and immediately following it in the report in the same volume at Page 364, in which the Director General was made a party, and in which the Director General appeared by R. Walton Moore, the Director General apparently considered himself subject to the 4th Section, for he did not even request argument on this question or make any objection on the ground, and in the Commission's decision it reaffirmed its opinion on this identical question announced in Johnson vs. A. T. & S. F. Ry. and apparently throughout the period of Federal Control no objection was ever made as far as we have been able to discover, on the ground which counsel now refers to as extraordinary on the part of the Commission. The Director General considered himself subject to the 4th Section, acted thereon by applying for relief and raised no question as to his obligation to secure the order of the Commission in the event he desired to charge more for the shorter than for the longer haul over the same route.

In addition, we submit that the language of this Court in the case of Mo. Pac. vs. Ault, 256 U. S. 559,

decided June 1st, 1921, interpreting Section 10, is very pertinent:

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such right or remedies might interfere with the needs of federal operation. The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917, to cases where the cause of action arose before that date and the suit against the company was filed after it, and to cases where both cause of action and suit had arisen or might arise during federal operation. The government was to operate the carriers, but the usual immunity of the sovereign from legal liability was not to prevent the enforcement of liabilities ordinarily incident to the operation of carriers. The situation was analagous to that which would exist if there were a general receivership of each transportation system. Operation was to be continued as theretofore with the old personnel, subject to change by executive order. The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the President for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the

carriers were not to be affected by the change of control.

"This purpose Congress accomplished by providing that 'carriers while under federal control' should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore".

And again, at Page 560:

"The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the government.

"Thus, under Section 10, if the cause of action arose prior to government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the government, save for the immunity of the physical property from levy and the power of the President to regulate suits in the public interest as by fixing the venue, or the time for trial. If the cause of action arose while the government was operating the system, the 'carrier while under federal control' was nevertheless to be liable and suable.

> This means, as a matter of law, that the government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts" * * *

It is true in that case the Court held that the government was not liable for penalties under a state law, but was liable for damages which might reasonably include interest and costs, and this decision is examined and followed in the very recent case of Director General vs. Kastebaum, decided November 12, 1923, 44 Supreme Court Reporter, 52, wherein the Director General was held liable for damages for false imprisonment, and in that decision the Court, speaking through the chief justice, said:

> "The government under Section 10, in the case of false imprisonment stands exactly as if it were a railroad corporation operating as a common carrier. Such a corporation would clearly be responsible for an arrest of the kind here shown as without probable cause, and made by one of its detectives employed to protect the property entrusted to its care as a common carrier."

It is suggested on Page 77 of the supplemental brief as one of reasons why the 4th Section did not apply to the Director General was that competitive conditions were eliminated by federal control which were at the bottom of the evil aimed at during private control. That fact is more of an argument for the Director General

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being subject to the 4th Section than not, for the only reason for permitting a greater rate for the shorter haul was competitive conditions, and the elemination of competitive conditions eliminated any reason for the Director General establishing any higher rate for the shorter haul, and hence is more of an argument in favor of the inhibition of the 4th Section against the Director General than of the fact that he could arbitrarily make a higher charge for the shorter haul than for the longer. It was certainly not the purpose of Congress to arbitrarily put in the hands of the Director General an instrument which with transportation competition eliminated could only be a means of killing business, and no such arbitrary power was certainly intended, for under the existence of federal control the only purpose of establishing such a rate would be to kill the business to the shorter point to the advantage of the longer point. The intent of the Federal Control Act was diametrically the opposite, for any rate established by the Commission was subject to the jurisdiction of the Interstate Commerce Commission—the only limitation upon it was that pending the investigation and decision the rate should not be suspended—it did not legalize the rate which might thereafter be found on investigation to be illegal, and it did not take out of the jurisdiction of the Court and place in the Commission jurisdiction of any question which had previously by existing law been lodged in a court.

The discussion of the supplemental brief is apparently made as a general discussion of the law without any particular reference to the record in this case. The discussion continually refers to the 4th Section order of the Interstate Commerce Commission, No. 7316, and the same is set out as an appendix to the brief. Neither this order nor the application thereof was offered in evidence and is not before this Court.

We respectfully submit that the judgment of the lower courts should be affirmed.

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Attorney for Defendant in Error.